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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. A-509

AMERICAN ALUMINUM CORPORATION, *et al.*,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[redacted]

AMERICAN ALUMINUM CORPORATION, *et al.*,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, American Aluminum Corporation, a corporation, and Norman J. Foucha and Bobby G. Smith, individually and as officers of the corporation, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit ordering enforcement against all petitioners of a prohibitory order entered against them by the Federal Trade Commission.*

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* References: App. ——, refers to the attached appendix.

Note: All citations in App. —— are extractions from the printed record.

OPINIONS BELOW

The Federal Trade Commission issued a cease and desist order against all petitioners on July 2, 1974, unofficially reported at 3 Trade Regulation Reporter (CCH, 1975) ¶ 20,665. The Commission ruled that petitioners' appeal from the initial decision of the administrative law judge be denied in part and granted in part. (App. 79a-80a.) This order was appealed to the United States Court of Appeals for the Fifth Circuit, which ordered enforcement of the Federal Trade Commission's final order. *American Aluminum Corp.* v. *FTC*, 522 F.2d 1278 (1975). The Federal Trade Commission's final order and opinion are set out in full at App. 65a-80a. The per curiam opinion of the Fifth Circuit Court of Appeals dated October 15, 1975 enforcing the Federal Trade Commission's prohibitive order is set forth at App. 81a.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on October 15, 1975. (App. 81a). Mr. Justice Powell extended the time for filing this Petition to March 13, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. May the Federal Trade Commission, by denying petitioners' pretrial motion for the issuance of subpoenas duces tecum directed to a number of competing organizations in petitioners' marketing area deprive petitioners of evidence which would bear on the nature and extent of the order?

2. Is the order issued by the Commission overly broad in directing its prohibitions to "all products" of any kind which petitioners may ever sell, rather than limiting its

scope to those products of the kind involved in the evidentiary hearing?

STATUTES AND REGULATIONS INVOLVED

Section 5(a)(1), Federal Trade Commission Act of September 20, 1914, c. 311, 38 Stat. 719, as amended, 15 U.S.C. § 45(a)(1) (1973 ed.):

> "Unfair methods of competition in commerce, and unfair or deceptive acts and practices in commerce, are declared unlawful".

Procedures and Rules of Practice for the Federal Trade Commission. Subpart D—Discovery; Compulsory Process; 16 C.F.R. § 3.34 SUBPOENAS:

> "(a) Subpoenas ad testificandum.
>
> • • •
>
> "(b) Subpoenas duces tecum. (1) Application for issuance of a subpoena requiring a person to appear and depose or testify and to produce specified documents, papers, books, or other physical exhibits at the taking of a deposition, or at a prehearing conference, or at an adjudicative hearing shall be made in writing to the Administrative Law Judge, and shall specify as exactly as possible the material to be produced, showing the general relevancy of the material and the reasonableness of the scope of the subpoena. Any motion to limit or quash such subpoena shall be filed within ten (10) days after service thereof, or within such other time as the Administrative Law Judge may allow.
>
> "(2) Subpoenas duces tecum may be used by any party for purposes of discovery or for obtaining documents, papers, books, or other physical exhibits for use in evidence, or for both purposes. When used for discovery purposes, a subpoena may require a person to produce and permit the inspection and copying of nonprivileged documents, papers, books,

or other physical exhibits which constitute or contain evidence relevant to the subject matter involved and which are in the possession, custody, or control of such person."

STATEMENT

The Federal Trade Commission brought a complaint against the petitioners under Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) [1] (App. 1a).

The petitioners at all times herein were engaged in the sale and installation of aluminum home repair and improvement products. The business was confined chiefly to contractual relationships between petitioners and consumer homeowners whose residences were in need of repair or renovation.

The complaint alleged that petitioners engaged in unfair and deceptive acts and practices primarily by means of their advertising formats (App. 2a-5a) and selling methods respecting these aluminum products and services (App. 5a-7a).

In the course of the Commission's adjudicatory hearing which followed, the Commission was permitted to offer evidence that petitioners advertised their aluminum siding and remodeling products and services by sending out "mailers" to local homeowners offering to install such aluminum products for $189.50 to $219.50, a price that was described as a saving of $431.00 ("lower priced" siding) (App. 29a-32a; 73a); that the promotional mail-

[1] The complaint was framed in two counts. Count I charged violations of deceptive trade practices under Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a); Count II charged violations of the Federal Consumer Credit Protection Act, 15 U.S.C. § 1601, *et seq.* The issues under Count II are abandoned. Matters in the record bearing on Count II issues are irrelevant to this proceeding.

ers also promised that if the attached response card were returned in seven days, a "free gift" of storm windows would be thrown in; that the mailers implied that the aluminum would last indefinitely; that homeowners who returned these mailers were visited by petitioners' salesmen, who made every effort to switch the purchaser to a higher priced, better quality aluminum product ("premium"); that the switching was accomplished by disparaging the lower priced product; that to induce sales, the salesmen would offer substantial reductions from a purported "regular" price of the higher priced, premium quality product, if the customer would permit the use of his home for advertising petitioners' products and services (the "model home" pitch) (App. 32a; 73a-74a).

The Administrative Law Judge found that the advertisements were unfair and deceptive practices in commerce, constituting Section 5 violations. As a consequence, the salesmen's selling methods following in the wake of the petitioners' advertisements were also held Section 5 unfair acts and practices.

The Administrative Law Judge's initial decision (App. 25a), affirmed as modified by the full Commission (App. 73a-80a), resulted in a final order (App. 65a) barring the petitioners from using the aforementioned advertising and selling methods in future business transactions.

In the course of the adjudicative hearing, the Administrative Law Judge barred the petitioners from obtaining evidence of a like kind from area competitors, whose notorious and longstanding advertising and selling meth-

[2] Subpoenas may be obtained only in application to the Administrative Law Judge. Rules of Practice of the Federal Trade Commission, 16 C.F.R. § 3.34. The subpoenas were directed to the following corporations: National Siding Corp.; Universal Sidings; Allied Aluminum Co.; Dixieland Construction Co.; Continental Enterprises. All were located in the vicinity of Birmingham, Alabama (App. 9a).

ods tracked the petitioners' activities in all material respects (App. 9a-24a).

Petitioners' motion for subpoenas disclosed that the competition's mail-out advertisements used similar pricing of low-grade materials to induce prospective purchasers to return the mailers, permitting their salesmen to visit them, who in all likelihood, switched the customers to higher priced materials and services (App. 13a-18a).

Petitioners' purpose in obtaining evidence from the files of its competitors was to expose the Commission's inconsistent standards respecting "unfair methods of competition" in the marketplace. Petitioners sought to prove that where the petitioners and their competitors beamed the same advertising and sales techniques to the public, the Commission's prohibitory order singled out the petitioners for discrimination, while their competitors seemingly enjoyed the Commission's solicitude.

Petitioners intended further to prove through the evidence obtained by the subpoenas that petitioners could reasonably believe their conduct was permissible because they made no different proposals in their advertisements than those with whom they were in competition and who were apparently under some kind of Commission regulation.[3] The contention was never controverted, and the search permitted by subpoenas would, at least, have ascertained the Commission's role. Appeals to the Commission (App. 20a; 23a) and the Court of Appeals (App. 81a) were fruitless. No other means of obtaining the evidence was available.

Among other things, the Commission's final order sweepingly provided that petitioners be barred from

[3] The complaint alleged that petitioners' acts and practices prejudiced and injured their competitors (App. 7a, parag. 10). The subpoenas may well have enabled petitioners to negate the charge.

using any advertisement of the kind described in the order "in connection with the offering for sale, sale, distribution or installation of aluminum siding, storm windows, storm doors *or any other products* . . ." (App. 65a-66a). (Emphasis added)

REASONS FOR GRANTING THE WRIT

1. Rejecting the application for the subpoenas *duces tecum* deprived petitioners of relevant evidence. In fashioning prohibitive orders, the Commission must consider the circumstances under which violative acts occur.[4] The arbitrary bar to petitioners' relevant evidence imposed by the Commission and sanctioned by the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

As the Court has stated in *FTC* v. *National Lead Co.*, 352 U.S. 419, 429 (1957):

> "Those in utter disregard of the law, as here 'call for repression by sterner measures than where the steps could reasonably have been thought permissible'."

Petitioners intended to prove through the testimony procured by the subpoenas that they could reasonably believe their conduct permissible because petitioners made no different proposals in their mail-out advertisements than those with whom they were in competition and apparently under *regulation*. The unfair action of the Law Judge precluded testimony on this point at the hearings.

To be sure, this Court has held that "the weight to be given to the facts and circumstances admitted, as well as the inferences *reasonably* to be drawn from them is

[4] See, *Snap-On Tools Corp.* v. *FTC*, 321 F.2d 825 (7th Cir. 1963), reversing the Commission's prohibitive order and dismissing the complaint.

for the Commission". *FTC* v. *Pacific Paper Ass'n.*, 273 U.S. 52, 63 (1927). (Emphasis added.) However, the inferences drawn by the Commission, like all inferences drawn from particular factual circumstances, are rebuttable. The inferences drawn by the Commission here could have been rebutted by the evidence which petitioners sought to introduce through the subpoenas *duces tecum* concerning petitioners' competitors.

Obviously there could have been no public or competitive injury—actual or speculative—as alleged in the complaint if, as petitioners sought to prove, petitioners gave the public no different information than their competitors. Yet petitioners were unable to proffer evidence concerning their competitive situation because of the arbitrary action of the Law Judge in denying petitioners' motion for subpoenas.

The Court of Appeals' affirmance of the Commission's arbitrary refusal of petitioners' request for subpoenas conflicted with the standards of fairness announced by this Court in *Morgan* v. *United States*, 304 U.S. 1, 18-19 (1938):

> "The right to a hearing embraces not only the right to present evidence but also *a reasonable opportunity to know the claims of the opposing parties and to meet them.* The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the government in a quasi-judicial proceeding aimed at control of their activities are entitled to be fairly advised of what the government proposes and *to be heard upon its proposals before it issues its final command*". (Emphasis added.)

Indeed, the courts have been sharply critical of the Commission's refusal to permit the introduction of evidence which would relent the Commission's *prima facie* showing of alleged illegal activities. As the court stated in

Niresk Industries v. *FTC*, 278 F.2d 337, 340-341 (7th Cir. 1960):

> "the Commission must be reprimanded for its apparent position in this case upon the pricing questions that it would hear just enough evidence as would, *prima facie*, sustain its findings as to the practices charged in the complaint and no more. The Commission, as other administrative agencies, occupies a unique position which was unknown to common law jurisprudence. The Commission wears all of the hats involved in proceedings instituted under its authority. It is, at once, the accuser, the prosecutor, the judge and the jury. The wide scope of its discretion in the resolution of questions within its realm is founded and sustained by the courts upon the fact that its jurisdiction exists in a specialized field, wherein expertise is felt to be a necessity. Under those circumstances we feel that the Commission should assume a wider responsibility than that necessarily undertaken by a private litigant and *substantiate its injunctive orders upon the concrete basis of a thorough investigation and full presentation of evidence whenever the existence of unfair or deceptive practices is charged against any respondent.*
>
> • • •
>
> "As we have indicated, we believe that the undisputed testimony of those witnesses, considered in the light of the record as a whole, does form a substantial basis upon which the Commission's findings rest. Upon that basis we sustain the Commission's findings, *but it ill behooves the Commission to take the position that it need adduce only enough evidence to barely sustain its ultimate decision. Such a position can only lead to a lessening of respect and confidence in the Commission's integrity and act.*" (Emphasis added.)

In contrast to the Court of Appeals' affirmance of the Commission's arbitrary stance respecting these petition-

ers, the court in *Rayex Corp.* v. *FTC*, 317 F.2d 290, 294-295 (2d Cir. 1963), set aside an FTC order on the ground, *inter alia*, that the Commission had made no effort to explore seasonal price fluctuations regarding a product susceptible to such variations, where the manufacturer was charged with deceptive preticketing of its sunglasses, which other dealers habitually marketed at substantially less than the preticketed price.

Again in contrast to the Court of Appeals' per curiam affirmance of the Commission's arbitrary refusal of petitioners' request for five (5) subpoenas *duces tecum*, the Seventh Circuit Court of Appeals in *Papercraft Corp.* v. *FTC*, 472 F.2d 927 (1973), although sustaining the rejection of a request for 551 subpoenas, nevertheless noted that:

> "the Commission's analysis, though it may justify denial of a wholesale request for 551 subpoenas, does not justify the denial of a more limited number *which might have demonstrated error in aspects of the prima facie case. This argument is valid.*" *Id.*, 472 F.2d at 429. (Emphasis added.)

The government's argument asserts that "the FTC is not precluded from stopping the law violations of a particular firm merely because some other firms may be engaged in similar practices", citing *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411 (1958). But this is no answer to why the competition enjoys the solicitude of the Commission by some means, while petitioners are being annihilated. It is not that the Commission has simply failed to act against the competitors, but rather it has adopted some kind of regulatory approach to the competitors totally inconsistent with its approach toward the petitioners. It is a strange FTC which seeks to stamp out deceptive advertising generally while wading through numerous apparent violators to grab the petitioners, claiming along the way that their competitors were not

visible. This tactic flies in the face of this Court's admonition in *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967):

> "[T]he Federal Trade Commission does not have unbridled powers to institute proceedings which will arbitrarily destroy one of many law violators in an industry."

In short, the refusal to permit the introduction of any evidence respecting the competitive situation in which petitioners found themselves is unfair. It focuses on petitioners for singularly onerous treatment. In conflict with the action of the Court of Appeals below, the Second Circuit Court of Appeals, in *Marco Sales Co.* v. *FTC*, 453 F.2d 1, 6-7 (1971), criticized the Commission's arbitrary action:

> *"The arbitrary character of the Commission's action here consists of its total failure to even advert to, much less explain, its reason for the rigid ad hoc adjudicatory stance it adopted toward the petitioner and the flexible tolerance its industry regulation displayed to those utilizing the same or similar devices.* As Circuit Judge John R. Brown pointed out in his concurring opinion in *Mary Carter Paint Co.* v. *FTC*, 333 F.2d 654, 660 (5th Cir. 1964), rev'd. on other grounds, 382 U.S. 46, 86 S.Ct. 219, 15 L.Ed.2d 128 (1965): 'Our complex society now demands administrative agencies. The variety of problems dealt with make absolute consistency, perfect symmetry, impossible. And the law reflects its good sense by not exacting it. *But law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated.* There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case.'" (Emphasis added and citations omitted.)

The final order of the Commission, passed under circumstances where the agency shielded itself from the relevant facts, is a denial of elementary due process.

The Commission's conclusion that the testimony sought by petitioners under subpoena was irrelevant, was a contradiction in terms. How may relevance be determined without first hearing the testimony? There would be time enough then to rule on admissibility. Is the Commission's so-called "expertise" so pervasive that it may attribute to itself occult powers permitting it to dispense with the appearance and testimony of live witnesses and relegate the evaluation of documentary evidence to guesswork? What are the limits of the Commission's powers under Section 5 to declare acts "unfair" or "deceptive"? Unless this Court intervenes to fix the parameters of Section 5 authority, the Commission will continue its sweeping arbitrary action.

It is strange indeed to hear the Commission's spokesmen elucidate its industry-wide enforcement programs before Congressional committees [5] and public symposiums, on the one hand, and on the other, find in practice that the Commission chooses to rack up its accomplishments in this kind of selective, one-on-one adjudicatory hearing.

The pious statements of former Commissioner Jones [6] ran:

> "Industry-wide enforcement of the law is almost a Constitutional imperative as a matter of both fairness and equality before the law. It is clear we have no right to and could not permit some violators to go free while prosecuting others * * *."

[5] FTC Statement, Hearings before House subcommittees on Appropriations, 89th Cong., 1st Sess., Book 3, pp. 408-409; also pp. 820-830.

[6] An address on February 25, 1965 before the District of Columbia Bar Association.

Former Chairman Paul Rand Dixon publicly stated: [7]

> "It must be recognized that some illegal practices are so widespread within an industry that to single out a few of the sinners would be unfair. Simple justice would dictate that the approach to the problem be of sufficient scope to give all violators an opportunity to rid themselves of the illegality simultaneously and without suffering competitive injury in the process."

On another occasion Mr. Dixon said: [8]

> "The man who is willing to comply with the law simply cannot afford to if his competitor is allowed to go on violating it."

The two faces of the Commission, one of concern for equality when gingerly approaching Congress for funds, and the other fashioned as a sword to annihilate selectively those denied its solicitude, require the spotlight of this Court's examination. The Federal Trade Commission's unbridled power needs some "fencing in".

2. The Commission's "all products" order, affirmed and enforced by the Fifth Circuit Court of Appeals below, conflicts with other Fifth Circuit decisions and those of the Sixth and Seventh Circuit Courts of Appeal striking down "all products" orders as excessive and beyond the power of the Federal Trade Commission.

The Commission's complaint and adjudication proceedings against the petitioners confined the charges and evidence to issues of unfair and deceptive acts and practices respecting their advertising and sale of aluminum home improvement products and services. Nothing pointed to

[7] On June 15, 1965 before the Georgia Association of Broadcasters, Inc., Pine Mountain, Georgia.

[8] Voluntary Law Enforcement: "An Approach to Administrative Delay", briefing Conference on Restraint of Trade and Trade Regulations, at Washington, D. C., March 17, 1965.

the petitioners as habitual violators or to even a single prior contact with the Federal Trade Commission or any other regulatory agency.

While petitioners must expect some "fencing in",[9] the final prohibitory order tends rather to eradicate them from the marketplace. The words, "*or any other products*", without limitation, leave no doubt of the Commission's zeal to annihilate the petitioners. The final order directed the petitioners to cease and desist from a list of acts and practices "in connection with the advertising, offering for sale, sale, distribution or installation of aluminum siding, storm windows, storm doors *or any other products*, in commerce, as 'commerce' is defined in the Federal Trade Commission Act . . ." (Emphasis added). (App. 65a-66a).

Justification for the sweeping "all products" order stemmed from the Commission's undocumented, tea-leaf prophecy of petitioners' planned dishonesty for the rest of their lives. The order's sole support for the "all products" language is the following: (App. 78a-79a)

> "Having systematically misrepresented their products and their terms of trade for so many years (the firm was organized in 1965), it would be unrealistic, we think, to expect them to voluntarily adopt a program of honest business dealing when and if they find it in their interest to begin selling some new line of products."

Recognition of the Commission's vast and undefined "expertise" has not, until now, embraced the oracle's role.

The overreaching effect of the Commission's order should be harnessed and modified to conform to the decision and rationale limiting the scope of prohibitive orders respecting the term "any products" in *American Home*

[9] These words were contained in the Commission's opinion, citing *FTC* v. *National Lead Co.*, 352 U.S. 914, 431 (1957). App. 79a).

Products Corp. v. *FTC*, 402 F.2d 232 (6th Cir. 1968). Modifying a sweeping Commission order, the court said at 237:

> "We are also of the opinion that the order must be modified by striking the provision which prohibits petitioners from disseminating any advertisement 'in connection with the offering for sale, sale, or distribution of *any* "drug" * * * which misrepresents directly or by implication the efficacy of such drug'. An order of the Commission must bear a reasonable relationship to the unlawful practice found to exist * * *.
>
> "The proceedings * * * in this case dealt exclusively with Preparation H; no other drug was involved. It was not established that petitioner was an habitual violator of the Federal Trade Commission Act, even though it is not a first offender. The effect of this provision of the Commission's order is to admonish petitioner not to violate the law again. Such an order would in practical effect, transfer the task of enforcing the Federal Trade Commission Act, as regards this petitioner, to the district courts under 15 U.S.C. § 56. This is not within the contemplation of the Act."

Unless this Court intervenes (at least to require modification of the existing order striking the terms "or any other products"), limiting the prohibitions to products and services of a like kind to aluminum home improvements, these petitioners shall remain subject to civil penalties in a district court proceeding under 15 U.S.C. § 56 [10] despite the absence of a Section 5 administrative

[10] 15 U.S.C. § 56 provides: "Whenever the Federal Trade Commission has reason to believe that any person, partnership, or corporation is liable to a penalty under section 54 of this title or under subsection (1) of section 45 of this title, it shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions of such section or subsection."

cease and desist order respecting a future business wholly unrelated to the advertising and sale of aluminum home improvement products and services.

Tracking the rationale of *American Home Products*, *supra*, the Fifth Circuit Court of Appeals in *Grove Laboratories* v. *FTC*, 418 F.2d 489 (1969), held the Commission's order covering *"any drug"*, without limitation, too broad. Striking the term *"any drug"* from the order, and limiting the prohibitions to hemorrhoidal ointments, the court held, 418 F.2d at 496:

> "It will be noted that this prohibition refers to any and all drugs which may be sold by the petitioner and not just to those confined to treatment of hemorrhoids. In other words it is an all-encompassing prohibition that covers all drugs of every kind and character. It would subject the petitioner to contempt penalties as set forth in the Act should it be violated with respect to any drug sold by the petitioner".

Unless this Court intervenes to modify the outstanding order by striking the terms "or any other products", absurd results may occur. As matters stand, these petitioners, on the one hand, may be subjected to heavy penalties and fines under their broad order for advertising and selling drugs and ointments in violation of the Commission's notions of "fairness" under Section 5 of the Act. On the other, Grove Laboratories and American Home Products, under their respective limiting orders, would be immune from such penalties for Section 5 violations in the advertising and sale of aluminum home improvement products and services.

The Commission and the Court of Appeals below admonished that "those caught violating the Act must expect some fencing in". (App. 79a). But no court should sanction a remedy which leaves no path on which a past violator can "travel without anxiety". *Federated Wholesalers Service* v. *FTC*, 398 F.2d 253, 260 (2d Cir. 1968). The Commission and the court below have so far departed from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision lest the petitioners, through rank discrimination, be denied their right to make a living in the community.

The Seventh Circuit Court of Appeals recognized this kind of power abuse in *Spiegel, Inc.* v. *FTC*, 411 F.2d 481 (1969). Spiegel was charged under Section 5 of the Act with promoting the sale of merchandise using false and misleading claims. The overbroad prohibitory order issued by the Commission recited:

> "3. Misrepresenting, *in any manner*, the savings available to purchasers of (petitioner's) merchandise." (*Id.*, at 484.)

Holding the order too broad, it was modified "limiting it to the type of sale found violative here. Paragraph 3 should be stricken." *Spiegel, Inc.* v. *FTC*, *supra*, at 485. On this score, the *Spiegel* court reasoned, 411 F.2d at 484:

> "This provision is so broad and imprecise that Spiegel might well be fearful of advertising any kind of sale of its merchandise in the future. * * * In any event there is no justification for the imprecisely drawn, excessively broad order entered by the Commission."

The broad scope of the final order below ignores this Court's warning to the Commission in *FTC* v. *Henry Broch & Co.*, 368 U.S. 360 (1962), respecting the necessity for clarity in its orders. At 368 U.S. 367-368 this Court said:

> "The severity of possible penalties prescribed * * * for violations of orders which have become final underlies the necessity for sustaining orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application."

So much of the final order reciting the words "or any other products" should be stricken.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

[2]

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Docket No. 8865

In the Matter of

AMERICAN ALUMINUM CORPORATION,
a corporation, and
NORMAN J. FOUCHA and
BOBBY G. SMITH, individually
and as officers of said
corporation.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Truth in Lending Act and the regulations promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that American Aluminum Corporation, a corporation, and Norman J. Foucha and Bobby G. Smith, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and of the regulations promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH ONE: Respondent American Aluminum Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Alabama, with its principal office and place of

business located at 1624 6th Avenue North, Birmingham, Alabama.

Respondents Norman J. Foucha and Bobby G. Smith are the principal officers of the said corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their business address is the same as that of the corporate respondent.

[3]

PARAGRAPH TWO: Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of residential aluminum siding, storm windows, storm doors and various other home improvement products to the public and in the installation thereof.

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count I as if fully set forth verbatim.

PARAGRAPH THREE: In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, advertising and promotional material, contracts, and other business papers and documents to be shipped and transmitted from and to their place of business, located as aforesaid in the State of Alabama and from the suppliers of said products, located in various states of the United States to their prospective purchasers and purchasers thereof, located in various other states of the United States, other than the State of Alabama and the states in which said suppliers are located, and maintain, and

at all times mentioned herein have maintained, a substantial course of trade in said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PARAGRAPH FOUR: In the course and conduct of their business, as aforesaid, and for the purpose of inducing the purchase and installation of their home improvement products, respondents have made numerous statements and representations, in their advertising, promotional material, direct mail advertising and through oral statements and representations made by their salesmen or representatives to prospective purchasers, respecting the nature of their offer and the price, time limitations, guarantee and the quality of their products.

Typical and illustrative of respondents' published advertising representations, but not all inclusive thereof, are the following:

"ALL-ALUMINUM SIDING SALE
MANY MONTHS TO PAY—LOW MONTHLY PAYMENT
PAY NOTHING FOR MONTHS AFTER INSTALLATION
$199.50

[4]

FREE BONUS

Special offer to you—If you act promptly we will include Storm Windows for every window in your home as a FREE bonus with the purchase of our All Aluminum or Siding Special.

100% Guaranteed Genuine Aluminum Siding Completely installed by our expert home finishers

Absolutely no extras to pay

One lifetime installation protects forever

THIS CARD IS WORTH $431.00 TO YOU AND YOU GET A BONUS GIFT FREE WITH PURCHASE

THIS IS A LIMITED OFFER!!

Mail this card within 7 days to become eligible for this savings, plus FREE Storm Windows for every window in your home with the purchase of this Aluminum Siding for your home."

PARAGRAPH FIVE: By and through the use of the aforesaid statements and representations and others of similar import and meaning not specifically set out herein, and through oral statements made by their salesmen or representatives, respondents represent, and have represented, directly or by implication, that:

1. The offer set forth in said advertisements is a bona fide offer to sell the advertised products at the prices and on the terms and conditions stated.
2. Respondents' products are being offered for sale at special or reduced prices, and that savings are thereby afforded to purchasers from respondents' regular selling price.
3. Respondents' advertised offer is made for a limited time only.
4. That purchasers of respondents' products would receive a Free Bonus or gift in the form of free storm windows.
5. After the installation of respondents' aluminum siding is completed, the homes of purchasers will be used for demonstration and advertising purposes by the respondents; and, as a result of allowing

their homes to be used as models, purchasers will be granted reduced prices or will receive allowances, discounts or commissions.

6. Certain of respondents' home improvement products are unconditionally guaranteed or guaranteed for life.
7. Respondents' siding materials will never require painting.

PARAGRAPH SIX: In truth and in fact:

1. Respondents' said advertised offers are not genuine or bona fide offers but are made for the purpose of obtaining leads as to persons interested in the purchase of respondents' products. After obtaining such leads, respondents' salesmen or representatives call upon such persons at their homes and, according to their established mode of operation, respondents' salesmen or representatives disparage the advertised product and otherwise discourage the purchase thereof and attempt to sell and frequently do sell a different and more expensive product instead of the advertised product for which the customer was originally solicited.
2. Respondents' products are not being offered for sale at special or reduced prices, and savings are not thereby afforded purchasers because of reductions from respondents' regular selling prices. In fact, respondents do not have regular selling prices but the prices at which respondents' products are sold vary from customer to customer depending on the resistance of the prospective purchaser.
3. Respondents' advertised offer is not made for a limited time only. Said merchandise is advertised regularly at the represented prices and on the terms and conditions therein stated.

4. Purchasers of respondents' products do not receive a Free Bonus gift in the form of free storm windows.

5. After installation of respondents' aluminum siding is completed, homes of purchasers are not used for demonstration or advertising purposes; and pur-

[6]

chasers, as a result of allowing their homes to be used as models, are not granted reduced prices, nor do they receive allowances, discounts or commissions.

6. Respondents' home improvement products are not unconditionally guaranteed or guaranteed for life. Such guarantee as may be provided is subject to numerous terms, conditions and limitations respecting the duration of the guarantee and the extent and manner of performance thereunder. Furthermore, in a substantial number of cases, respondents or their salesmen or representatives fail to furnish any written guarantee to the customer and fail to disclose the life during which said guarantee applies.

7. Respondents' siding materials will require painting.

Therefore, the statements and representations set forth in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PARAGRAPH SEVEN: In a substantial number of instances and in the usual course of their business, respondents sell and transfer their customers' obligations, procured by the aforesaid unfair, false, misleading and deceptive means, to various financial institutions. In any subsequent legal action to collect on such obligations, these financial institutions or other third parties, as a

general rule, have available and can interpose various defenses which may cut off certain valid claims customers may have against respondents for their failure to perform or for certain other unfair, false, misleading or deceptive acts and practices.

PARAGRAPH EIGHT: In the conduct of their aforesaid business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of aluminum siding and other home improvement products of the same general kind and nature as those sold by respondents.

[7]

PARAGRAPH NINE: The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PARAGRAPH TEN: The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

(Count II Not Material to the Petition.)

* * * *

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 4th day of October, A.D. 1971, issues its complaint against said respondent.

[63]

MOTION FOR SUBPOENA DUCES TECUM

To: Honorable Edward Creel,
Director, Hearing Examiners

Respondents herein move the Hearing Examiner for issuance of subpoenas directed to the following named entities:

1. National Siding Corp.
2. Universal Sidings
3. Allied Aluminum Co.
4. Dixieland Construction Co.
5. Continental Enterprises

Attached hereto are points and authorities in support of this Motion. There is also attached an appendix setting

[64]

forth the specifications for the subpoenas with respect to each entity.

Respectfully submitted,

/s/ Joseph J. Lyman
Joseph J. Lyman
1200 18th Street, N.W.
Washington, D.C. 20036

[Attorney for Respondents]

[65]

POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUBPOENA DUCES TECUM

The Complaint charges the respondents with making false, misleading and deceptive representations with respect to the sale of certain home improvement products. The Complaint further alleges that respondents are in substantial competition with other entities in the sale of similar products inferring that respondents' selling methods injure competition.

The respondents' advertising techniques are extensively used by its competitors in the market place where respondents do business. Nevertheless, the Complaint alleges that respondents injure their competitors in the course of its business (paragraph 8 of the Complaint).

[66]

In order to determine what effects respondents' advertising have had on its competitors, it is necessary to look into the actual practices of these competitors. Attached are sample advertisements (collected within the period of the Complaint) by a selected group of highly visible competitors of the respondents. These ads offer the same inducements for purchase in almost the same language as that used by respondents. The respondents, the butt of this Complaint, insert no materially different qualifications with respect to sales than that of their competitors, who apparently move free in the competitive market without restraint.

Therefore it is relevant to examine in detail the practices of respondents' competitors in order to determine in what respect their advertisements and selling practices conform to the Commission's rules while respondents' appear to be in violation. Respondents rea-

sonably believe that no vendor gives merchandise away and they further believe that their offers of bonuses and the like are a common place selling practice to stimulate selling activity for home improvement products. We have a situation where the allegations of deception are so tenuous that respondents are entitled to

[67]

develop fully either the activity of their competitors, as a matter of reality, different from theirs so as to warrant the apparent solicitude of the Commission, while respondents become subjected to penal sanctions.

Without specified evidence from its competitors, any record made against respondents should remain speculative with respect to what is the fact regarding false and deceptive statements in all of the advertisements, respondents and competitors alike.

The similitude of respondents' and their competitors' advertisements, in the light of the charges of deception set out in the Complaint, requires that respondents' motion for the issuance of subpoenae be granted so that respondents will be afforded due process with respect to its defenses.

If this issue were tried pursuant to the Federal Rules of Civil Procedure, parties defendant in the position of these respondents would have an uninhibited right to explore and develop evidence in aid of their defenses. No reason presents itself why these respondents should have limitations placed on their development of their defenses in an administrative hearing.

[68]

Wherefore, the respondents move the Hearing Exam-

iner for issuance of subpoenae *duces tecum* directed to each of the corporations listed in the motion attached.

Respectfully submitted,

/s/ Joseph J. Lyman
Joseph J. Lyman

Attorney for Respondents

[69]

BEST COPY AVAILABLE

ALUMINUM
SIDING SALE
LAST TWO WEEKS! FREE SURVEY ANYWHERE
No Obligation To Buy

INCLUDES ALL LABOR & MATERIALS FOR ANY SIZE HOME UP TO 1000 SQ. FT.

$299

ALL OTHER TYPE SIDING AVAIL. VINYL, STEEL ETC.
OFFER GOOD ANYWHERE
IN ALA., MISS., TENN. OR GEORGIA

DEBBIE BROWN'S

DELUXE SHUTTERS FOR EVERY WINDOW IN YOUR HOME

BAD CREDIT—NO PROBLEM

UNIVERSAL SIDINGS
102 FAUST AVE.
Hueytown, Ala. 35020

COUPON
CLIP & MAIL TODAY
NAME.....
ADDRESS.....
PHONE.....
DIRECTIONS.....

ALL-ALUMINUM SIDING SALE

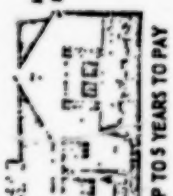
MANY HOMES TO PAY - LOW MONTHLY PAYMENTS
PAY NOTHING FOR MONTHS AFTER INSTALLATION

$499.00

Completely Installed,
NO EXTRAS
COMPLETELY INSTALLED bubble-free and sealed for any average size home up to 1000 square feet.

STOP UNNECESSARY HOME PROBLEMS. Wind Storm Tightness, High Fuel Costs, Chilly Drafts, Uncomfortable living due to poor insulation.

ENJOY EVERLASTING HOME BEAUTY. Comfortable living and Savings ... Also your home can be made into a truly modern home.



NO MONEY DOWN - UP TO 5 YEARS TO PAY

MAIL THIS CARD TODAY

IN LESS THAN TWO WEEKS YOUR FRIENDS WILL THINK YOU HAVE A BRAND NEW HOME
-Aluminum against mold in color, harm to woman.
-Costs having repaint.
-Our low price includes labor and material

ALLIED ALUMINUM COMPANY
P. O. BOX 2277
HUEYTOWN, ALABAMA 35020

BUSINESS REPLY MAIL
First Class Permit No. 140 Bessemer, Ala.

Postage Will Be Paid by Addressee

THIS IS A LIMITED OFFER!!

CHECK YOUR SERIAL NUMBER AGAINST THESE WINNING NUMBERS.

GROUP #1

If your number appears here you get $100.00 off price

30122 30863 35862 37976 42771 67433
67789 98362 84320 93570 26518 89514
45819 10509 25088 25258 41894 32245
41125 49747 23406 58454 52615 55896
59632 46070 47417 78935 21508 97333
63322 76150 74677 49162 35641 27541
49560 62536 39830 58171 20546 57856

GROUP #2

If your number appears here you get $150.00 off price

68030 28485 54778 88238 62398 36328
14044 85393 53221 43151 35729 74695
40645 33559 36902 68485 25003 68860
41560 53402 66467 26080 29619 28884
45579 56970 52723 38672 93768 74204

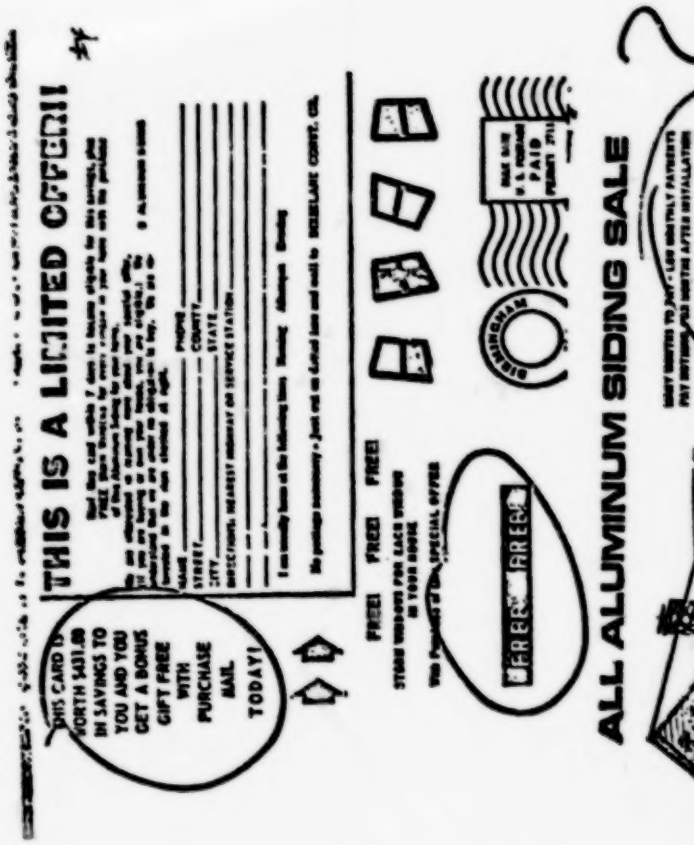
GROUP #3 GRAND PRIZE

If your number appears here you get $260.00 off price

47540 61749 30454 20298 43633 35368
34390 54736 36476 72138 63755 24984
34503 68214 37823 27541 22936 54634
33967 62134 56002 25432 91778 68638

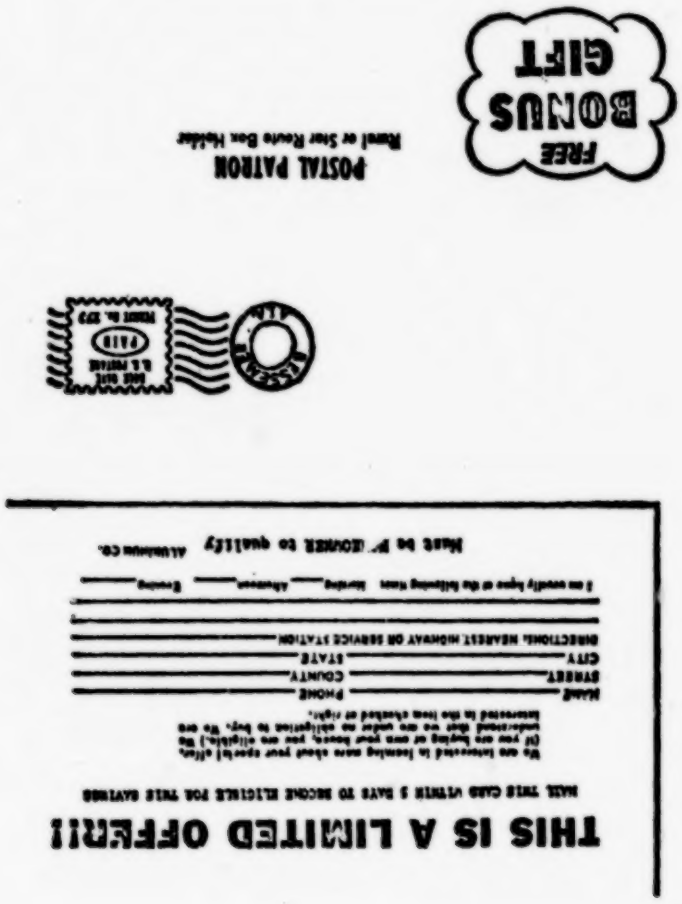
17a

[73]



16a

[72]



No. 72438
LUCKY NUMBER

CONGRATULATIONS.....

You have been chosen to receive a gift award in the new

SALE OF ALUMINUM SIDING

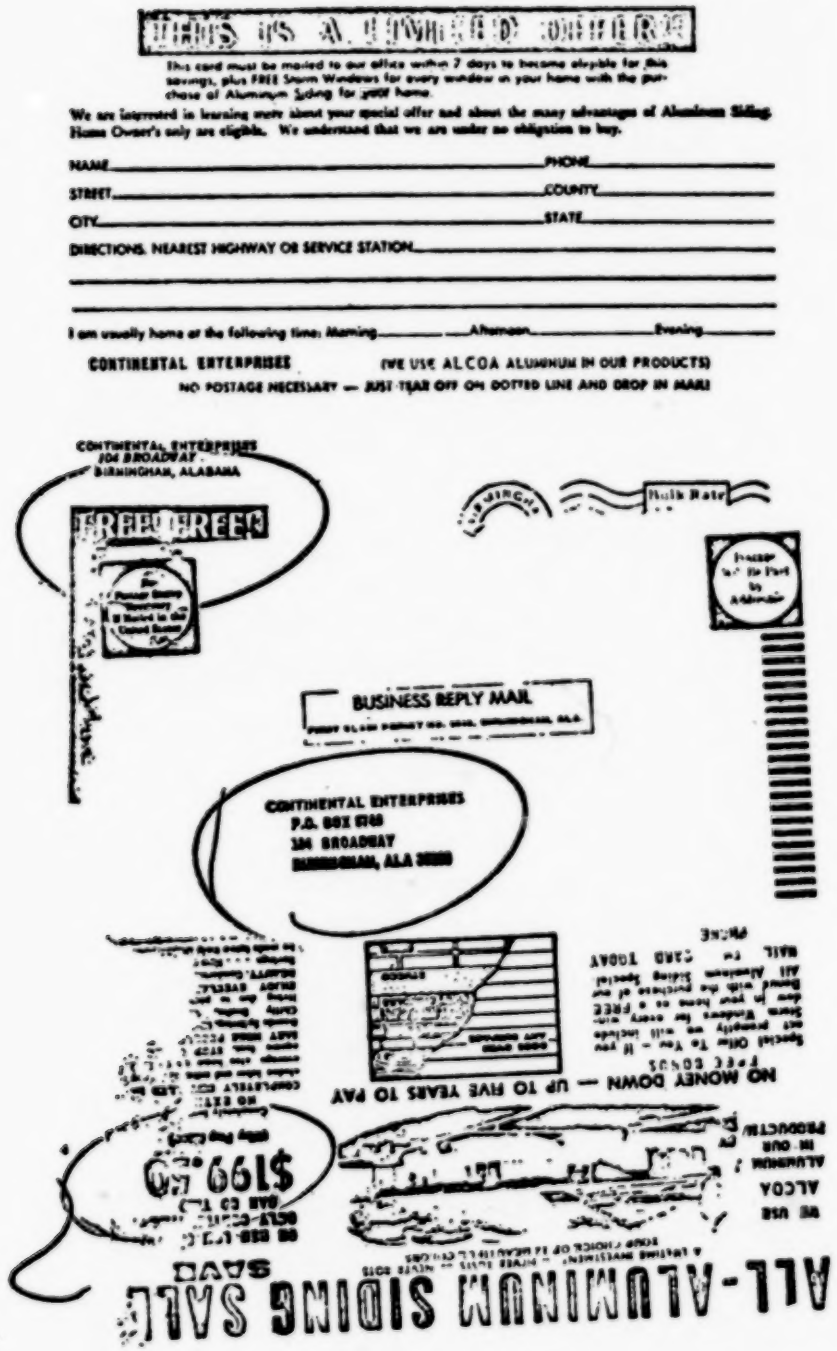
Thousands of dollars could be spent in advertising on radio, TV, and in the newspaper. However, we feel that the best possible advertising is to get some of our Aluminum Siding into each neighborhood and let word of its excellence be spread through the endorsement of a satisfied family. You must be a homeowner to qualify for this savings. Rental property will not be accepted. Since this is an advertising promotion, the time limit on this offer is five days.. Please fill out the enclosed card, postage paid, and mail today. You must accept or reject this offer upon showing.

Here's an example of your savings. The regular price of this Aluminum Siding is $499.00 which includes all material, taxes, and labor, up to 1200 sq. ft. of wall space. You have three chances of winning during this sale. If your serial number, located at the top of this page appears in group #1, you will get $100.00 off the regular price. If your serial number appears in group #2, you will get $150.00 off the regular price. If your serial number appears in the GRAND PRIZE group #3, you will receive $260.00 off the regular price.

If you have ever thought about having your home remodeled on the outside, now is the time.

THIS IS A LIMITED OFFER!!

BEST COPY AVAILABLE


THIS IS A LIMITED OFFER
This card must be mailed to our office within 7 days to become eligible for this savings, plus FREE Storm Windows for every window in your home with the purchase of Aluminum Siding for your home.
We are interested in learning more about your special offer and about the many advantages of Aluminum Siding. Home Owner's only are eligible. We understand that we are under no obligation to buy.
NAME PHONE
STREET COUNTY
CITY STATE
DIRECTIONS. NEAREST HIGHWAY OR SERVICE STATION
I am usually home at the following time: Morning Afternoon Evening
CONTINENTAL ENTERPRISES (WE USE ALCOA ALUMINUM IN OUR PRODUCTS)
NO POSTAGE NECESSARY — JUST TEAR OFF ON DOTTED LINE AND DROP IN MAIL!
CONTINENTAL ENTERPRISES
104 BROADWAY
BIRMINGHAM, ALABAMA
FREE FREE
BUSINESS REPLY MAIL
CONTINENTAL ENTERPRISES
104 BROADWAY
NO MONEY DOWN — UP TO FIVE YEARS TO PAY
$199.50
ALL-ALUMINUM SIDING SALE
SAVE

APPENDIX

SPECIFICATIONS FOR SUBPOENAE DUCES TECUM

Bring with you all records, documents, memoranda and writings of any kind relating to and in connection with the following:

1. The firms' rules, procedures and practices with respect to the handling of responses to advertising, either as a result of mail-outs or newspaper advertising.

2. Specimen copies of advertising by:

   a. mail;

   b. newspaper ads;

   c. radio or television transcripts.

3. Furnish any "canned" or prepared sales speeches or pitches used by the firms or furnished to their salesmen.

[76]

4. Produce twenty-five (25) completed job files disclosing contracts between the firm and its customers, cost sheets for construction or re-construction work, credit applications, credit investigation reports, correspondence between the firm and financial institutions extending credit for the performance of the work.

[86]

ORDER * * * DENYING REQUEST FOR ISSUANCE OF SUBPOENAS

* * * *

By an undated motion received by the Commission on March 10, 1972, respondents move for the issuance of subpoenas duces tecum directed to the following parties:

National Siding Corp.
Universe Sidings
Allied Aluminum Co.
Dixieland Construction Co.
Continental Enterprises

The specifications for the subpoenas duces tecum are as follows:

"Bring with you all records, documents, memoranda and writings of any kind relating to and in connection with the following:

"1. The firms' rules, procedures and practices with respect to the handling of responses to advertising, either as a result of mail-outs or newspaper advertising.

[88]

"2. Specimen copies of advertising by:

a. mail;

b. newspaper ads;

c. radio or television transcripts.

"3. Furnish any 'canned' or prepared sales speeches or pitches used by the firms or furnished to their salesmen.

"4. Produce twenty-five (25) completed job files disclosing contracts between the firm and its customers, cost sheets for construction or reconstruction work, credit applications, credit investigation reports, correspondence between the firm and financial institutions extending credit for the performance of the work."

Respondents claim that under the Federal Rules of Civil Procedure they "would have an uninhibited right to explore and develop evidence in aid of their defenses." The respondents' claim appears to be misplaced. The Commission's Rule 3.31, like the Federal Rules of Civil Procedure, contemplates that any matter, not privileged is discoverable if it is relevant to the subject matter of the proceeding. Here, it would appear that even if the evidence were discovered to show that respondents' alleged competitors in the marketplace use the same or even similar advertising techniques, these discovered facts would have no relevancy on the truth, falsity or tendency to deceive with regard to respondents' advertisements. Cf. *Royal Oil Corporation* v. *F.T.C.*, 262 F.2d 741, 745 (4th Cir., 1959); *Zenith Radio Corp.* v. *F.T.C.*, 143 F.2d 29, 31 (7th Cir., 1944). Moreover, recently in Docket 8752, *Universal Chemical, Inc.*, —— F.T.C. —— (decided September 23, 1971), the Commission emphasized that "a litigant has no right to be free from prosecution merely because his competitors are also alleged to be engaged in the same challenged practices." The examiner, therefore, concludes that the fact that alleged competitors are engaged in the same practices is not a defense relevant to the central issue of deception and unfairness.

IT IS ORDERED that respondents' request for extension of time is denied.

[89]

IT IS FURTHER ORDERED that respondents' motion for issuance of subpoenas duces tecum to the parties listed above be, and it hereby is, denied.

/s/ David H. Allard
DAVID H. ALLARD
Hearing Examiner

March 13, 1972

[97]

APPEAL FROM ORDER OF HEARING EXAMINER DENYING REQUEST FOR ISSUANCE OF SUBPOENAS DUCES TECUM AND FOR ADJOURNMENT OF HEARING

To: The Commission

Respondents appeal to the Commission, pursuant to Rule § 3.35(b) of the Rules of Practice, from the Order of the Hearing Examiner served on respondents' counsel March 15, 1972, and dated March 13, 1972, denying a request for issuance of subpoenas *duces tecum* and denying respondents' request for adjournment of the hearing for a period of 30 days.

* * * *

Respectfully submitted,

/s/ Joseph J. Lyman
JOSEPH J. LYMAN
Attorney for Respondents

* * * *

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ORDER DENYING APPEAL AND REQUEST FOR PERMISSION TO FILE APPEAL

This matter is before the Commission upon the filing by respondents on March 21, 1972 of a document entitled "Appeal From Order Of Hearing Examiner Denying Request For Issuance Of Subpoenas Duces Tecum * * *" which respondents state is made pursuant to § 3.35(b) of the Commission's Rules of Practice; and upon the answer of complaint counsel filed March 27, 1972 in opposition thereto.

There are two issues involved here: (The first issue is irrelevant to the petition.)

* * * *

The other issue concerns the hearing examiner's denial of respondents' request for subpoenas duces tecum to be issued to five companies which apparently are competitors, seeking copies of advertisements and other documents and information. Respondents have made no showing to support their appeal on this issue, as required by § 3.35(b) of the Commission's Rules of Practice. Moreover, this is a matter of discovery and rulings thereon are ordinarily left to the sound discretion of the hearing examiner. Respondents here made no showing of error. Thus, the appeal on this issue likewise will be denied. According,

IT IS ORDERED that respondent's appeal from the hearing examiner's order of March 13, 1972 to the extent such order denies a request for an extension of time to comply with the pretrial order, treated herein as a request for permission to file an interlocutory appeal, be, and it hereby is, denied.

IT IS FURTHER ORDERED that respondents' appeal from the hearing examiner's order of March 13,

1972 to the extent such order denies respondents' request for the issuance of subpoenas duces tecum be, and it hereby is, denied.

By the Commission.

/s/ Charles A. Tobin
Charles A. Tobin
Secretary

ISSUED: April 7, 1972

[355]

Filed: October 9, 1973

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

IN THE MATTER OF

Docket No. 8865

AMERICAN ALUMINUM CORPORATION, a corporation, and NORMAN J. FOUCHA and BOBBY G. SMITH, individually and as officers of said corporation.

INITIAL DECISION

By David H. Allard, Administrative Law Judge.

John H. Bedford and
W. Roland Campbell,
Counsel Supporting the Complaint.

Joseph J. Lyman,
Washington, D.C.,
Counsel for Respondents.

PRELIMINARY STATEMENT

This proceeding was commenced with the issuance of a complaint on October 4, 1971,[1] charging the corporate respondent and Norman J. Foucha and Bobby G. Smith, individually and as officers of the corporate respondent, with violations of Section 5 of the Federal Trade Commission

[356]

Act by committing unfair methods of competition and unfair and deceptive acts and practices in commerce and

[1] On brief, complaint counsel erroneously maintain the date to be April 3, 1971.

violating the Truth in Lending Act and the implementing regulations promulgated thereunder.

A pretrial conference was held on December 21, 1971; a request for Admissions was filed by complaint counsel on January 18, 1972, to which respondents timely failed to answer. On March 9, 1972, the matter was assigned to the undersigned. Hearings were held in Birmingham, Alabama, on April 4, 1972, in Chattanooga, Tennessee, on April 5, 6, and 7, 1972, and in Birmingham, Alabama, on May 30, 1972. Thereafter, hearings were held in abeyance to allow complaint counsel to proceed with remedies, the net result of which was to enforce the subpoenas issued by the Commission against the named individual respondents as well as several other individuals. When this matter was resolved, the hearings were promptly set and concluded in Birmingham, Alabama, on July 10 and 11, 1973. Briefs were filed on September 10, 1973.

At those hearings, testimony and documents were incorporated in the record in support of the complaint as well as in opposition thereto. This proceeding, thus, is before the Administrative Law Judge upon the complaint, answer, admissions, testimony and other evidence, proposed findings of fact and conclusions, and briefs filed in support thereof submitted by the parties have been carefully considered and those findings not adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matter.

Having heard and observed the witnesses and having carefully reviewed the entire record [2] in this proceeding,

[2] References to the record are made in parenthesis, and certain abbreviations are used as follows:

Comp.—Complaint	Tr.—Transcript page
Ans. —Answer	CX—Commission exhibit
	RX—Respondents' exhibit

together with the proposed findings, conclusions, and briefs submitted by the parties as well as replies, the Administrative Law Judge makes the following findings as to facts, conclusions, and order.

[357]

FINDINGS OF FACT

1. Respondent American Aluminum Corporation is a corporation organized in 1965, under the laws of the State of Alabama, with its principal office located at 1624 6th Avenue North, Birmingham, Alabama.[3] (Comp., par. 1; Ans. par. 1).

2. Respondent American Aluminum Corporation also does business under the trade name National Aluminum Corporation. (Ans. par. 1).

3. Respondents Norman J. Foucha and Bobby G. Smith served as the principal officers of the corporate respondent. However, respondent Foucha sold his interest in the corporation to Bobby G. Smith in January 1971, and thereafter severed all relationships with the corporate respondent.[4] (Comp. par. 1; Ans. par. 1; Tr. 606, 607).

4. Respondent Bobby G. Smith now formulates, directs and controls the acts and practices of the cor-

[3] At some period of time, the principal office appears to have been moved to 228 First Avenue North, Birmingham, Alabama. (Tr. 697-98).

[4] In their proposed findings, respondents admit that the corporate respondents' internal office affairs and fiscal policies were conducted primarily by respondent Foucha as a corporate officer until he sold his interest to Bobby G. Smith (Tr. 609, 690, 707). Respondents also admit that during that time frame, respondent Bobby G. Smith in his capacity as a corporate officer hired the salesmen and generally was in charge of selling the corporate respondents' products. (Tr. 619, 690-91, 699, 707, 714).

porate respondent, including the acts and practices hereinafter set forth. (Comp. par. 1; Tr. 751-52, 754, 762, 608, 611-12, 621-22, 700).

5. Smith hires and fires salesmen (Tr. 609), furnishes leads to them (Tr. 706-07), approves and pays for the mailers and advertisements (Tr. 707-08), determines to whom mailers will be sent (Tr. 716), presides at sales meetings (Tr. 711-12); resolves disputes with customers (Tr. 705-06), assumes responsibility for installation (Tr. 699), and determines to which finance company to transfer the customers' retail installment contract (Tr. 704).

[358]

6. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, and distribution of residential aluminum siding, storm windows, storm doors and various other home improvement products to the public and in the installation thereof. (Comp. par. 2; Ans. par. 2).

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act,

7. Respondents, in the course and conduct of their business, now cause, and for some time last past have caused, their said products, advertising and promotional material, contracts, and other business papers and documents to be shipped and transmitted from and to their place of business, located as aforesaid in the State of Alabama and from the suppliers of said products, located in various states of the United States, to their prospective purchasers and purchasers thereof, located in various other states of the United States, other than the State of Alabama and the states in which said suppliers are

located, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act. (Comp. par. 3; Admitted at prehearing conference, Tr. 5).[5]

8. Respondents' gross sales during 1968, were $1,477,977 and in 1969, $1,664,867 (CX 10b). Since Smith became president in January 1971, sales have not diminished appreciably and during 1972, were about $1,000,000 (Tr. 712-13).

[359]

RESPONDENTS' ADVERTISEMENTS AND REPRESENTATIONS THEREIN

9. Respondents' principal method of advertising its products is through mailouts to people in selected areas where it plans to solicit business (Tr. 611, 616). Approximately 50,000 mailers were sent out each week (Tr. 714) to different states (Tr. 616). CX 1a-8b are typical mailouts. They represent formats of advertisements used by respondents during the period of 1961-1971 (Admission #2).

10. The mailouts most often sent out by American offered aluminium siding installed for $189.50, $199.50 or $219.50 with free storm windows (CX 1a-7b).

a. A salesman testified that leads given him were always from the mailers, with a price of $189.50, $199.50 or $219.50.

b. All of the 20 public witnesses whose testimony was adduced at the hearings had received

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[5] In their proposed finding No. 8, respondents also admit that their business "was transacted under circumstances disclosing, they were engaged 'in commerce' as that term is defined in the Federal Trade Commission Act."

mailers similar to CX 1a-7b. The mailers featured the cheaper grade siding at less than $219.50.

c. There was no evidence that the mailer featuring the more expensive siding (CX 8a-8b) had ever been used, except for the testimony of respondent Foucha, who claimed some had been sent out (Tr. 616).

11. Typical and illustrative of the contents of respondents' mailouts, but not all-inclusive thereof, are the following:

"ALL-ALUMINUM SIDING SALE

MANY MONTHS TO PAY—LOW MONTHLY PAYMENTS

PAY NOTHING FOR MONTHS AFTER INSTALLATION

$199.50

(CX 1a, CX 2a, CX 4a)

ENJOY EVERLASTING HOME BEAUTY

FREE BONUS

Special Offer To You—If you act promptly we will include Storm Windows for every window in your home as a FREE Bonus with the purchase of our ALL Aluminum or Siding Special.

[360]

* 100% Guaranteed Genuine Aluminum Siding
* Completely installed by our expert home finishers.
* Absolutely NO EXTRAS to pay.
* YOUR CHOICE of beautiful decorator colors.
* One lifetime installation protects forever!

(CX 1a, 2a, 3b, 4a, 5b, 6a, 33a, 35a).

THIS CARD IS WORTH $431.00 TO YOU AND YOU GET A BONUS GIFT FREE WITH PURCHASE

THIS IS A LIMITED OFFER!!

MAIL THIS CARD TODAY AND GET YOUR FREE GIFT

Mail this card within 7 days to become eligible for this savings, plus FREE Storm Windows for every window in your home with the purchase of this Aluminum Siding for your home."

(CX 1b, 2b, 7b, 33a, 35a)

12. Each of the mailouts sent out included a business reply card and when prospective customers fill in the reply cards and return them to respondents, the cards then become leads and are turned over to salesmen (Tr. 400-01, 619, 707). Thereafter, the salesmen make appointments with the prospective customers and attempt to sell them aluminum siding installed on their homes (Tr. 619). The respondents generally have two grades of aluminum siding that they offer to sell. The first is what respondents call Imperial siding and the second is referred to as cheaper siding (Tr. 704). The cheaper siding was offered for sale in respondents' mailers at $199.50, $189.50, $219.50 and $199.00 completely installed (CX 1a-7b). The Imperial siding is advertised in a mailer at a price of $199.50 (CX 8a-8b).

13. Respondent American furnished salesmen with its contract forms, mortgage forms, and rescission notices, and other forms necessary to make sales of aluminum siding (Tr. 465, 468). The salesman would then, upon making a sale, obtain the customer's signature on a blank retail installment contract which was later completed by American (Tr. 474).

14. Respondent American furnished salesmen unpainted samples of the cheaper grade aluminum siding

and storm windows (CX 59) to show to customers (Tr. 434). These samples were used by salesmen to show the siding advertised at less than $219.50, with a free storm window (Tr. 434).

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15. Through oral statements of its salesmen who called on prospective customers in response to receiving a reply from the mailouts, respondents made the following representations with regard to the transactions:

a. The offer set forth in said advertisements is a bona fide offer to sell the advertised products at the prices and on the terms and conditions stated.

b. Respondents' products are being offered for sale at special or reduced prices, and that savings are thereby afforded to purchasers from respondents' regular selling price.

c. Respondents' advertised offer is made for a limited time only.

d. That purchasers of respondents' products would receive a Free Bonus or gift in the form of free storm windows.

e. After the installation of respondents' aluminum siding is completed, the homes of purchasers will be used for demonstration and advertising purposes by the respondents; and, as a result of allowing their homes to be used as models, purchasers will be granted reduced prices or will receive allowances, discounts or commissions.

f. Certain of respondents' home improvement products are unconditionally guaranteed for life.

g. Respondents' siding materials will never require painting.[6]

[6] A, b, c and d above were admitted by respondents at the pretrial conference (Prehearing Tr. 21-22). The representations e, f and g, which were not admtited, will be discussed fully hereinafter under the headings "Representations Regarding Use of Home in Advertising," "Guarantee," and "Never Requires Painting".

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BAIT AND SWITCH SALES TACTICS

16. Respondents' sales methods were described by one respondent as "step up selling" which means "When you go into a customer's house and sell a product and after you sell the product you show them something besides what you've advertised." (Foucha, Tr. 610-11). To accomplish this, the salesman sells the cheaper grade siding and obtains a signed contract for it. After obtaining the signed contract, the salesman persuades the customer to purchase the Imperial grade siding at a much higher price (Smith, Tr. 733-34). Salesmen were told by respondents to sell the better grade material to earn a commission (Cameron, Tr. 410).

17. During the time period of March 12, 1969 through December 31, 1969, respondents neither sold nor installed any residential siding at the advertised prices of $189.50, $199.00, $199.50 or $219.50 (Admission #3). No documentary evidence was presented to show that American had ever sold residential siding at the above-mentioned prices.

18. According to respondent Foucha, American kept something like 100 squares of the cheaper grade siding on hand in its warehouse (Tr. 625). The installation manager testified that he had enough of the cheaper grade siding in stock to do only five or six jobs (Tr. 762). Even though it maintained this limited amount in stock, American purchased none of the residential siding advertised in the mailouts for cheaper grade siding (CX 1a-7b) during the years 1968 and 1969 (Admission #7). Although the records of sales for the nine-month period

show no sales at $219.50 or less, there were sales at much higher prices where it appears that the cheaper grade siding was used (Tr. 643-46; CX 11Z228, 11Z268, 11Z269). In these instances, the price per square far exceeded the price per square advertised in CX 1a-7b, which would be $19.95 to $21.95.

19. American could not have operated profitably if it had sold its aluminum siding at prices of $199.50 with free storm windows.

a. According to respondent Foucha, the cost of the siding, exclusive of any assessories needed to install it, was $10-12 per square and the installer was paid $6.00 per square (Tr. 620). A square is 100 square feet.

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Overhead expenses, including advertising, were for the year 1969, 34.7% (CX 10b) and on a $199.50 sale would amount to $69.23. On a $199.50 job, the siding would cost a minimum of $100, the installation cost would be $60.00 and overhead expense would be $69.23. This would total $229.23.

b. This figure, however, does not take into consideration any commission to the salesman or the cost of storm windows which were supposed to be given free with the job. Thus American, taking into consideration all costs and expenses of doing business, would lose money on any job done at less than $219.50.

20. Respondents discouraged their salesmen from selling the siding advertised for $219.50 or less by paying salesmen a very small commission on it, and a much better commission on the Imperial grade siding.

a. The commission on the Imperial grade siding was 50% of all money charged over $65 per square and thus depended on the price charged the customer (Foucha, Tr. 621).

b. The commission on the siding advertised at less than $219.50 was a couple of dollars (Cameron, Tr. 412). This, according to a salesman of American, being practically nothing, induced you to sell a better grade material (Tr. 412).

21. Respondents discouraged the purchase of aluminum siding advertised at a price of $219.50 or less by salesmen showing customers unpainted samples which were unattractive.

a. Fifteen public witnesses who had been switched to the Imperial grade siding were shown unpainted samples after they had first signed a contract for siding at $199.50 (Parkerson, Tr. 141; Ellis, Tr. 171; Smith, Tr. 247; Bryant Tr. 264, the testimony of 11 of these witnesses was stipulated as being the same as that of Woods Bryant, CX 60; hereinafter when reference is made to Bryant's testimony, it includes the 11 witnesses whose testimony was stipulated).

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b. These witnesses described the sample as looking like tin (Tr. 141, 247, 264) or what you would put on a barn (Tr. 140). One witness was told he would have to paint it right after it was put on to keep it from tarnishing (Ellis, Tr. 172). After Bryant saw the unpainted sample, he told the salesman he wouldn't have it (Tr. 265).

22. Respondents, after binding the prospective customer to a contract for the siding of $219.50 or less, immediately proceeded to disparage it, claiming that it

would require special maintenance and would not prove satisfactory.

a. Witnesses who had been switched were told that the $199.50 siding would require regular maintenance such as painting or treatment (Tr. 172, 247, 264).

b. Some were told it would rattle because of not being interlocked (Tr. 173, 174, 268) and that anything would dent it (Tr. 269).

c. Four witnesses who contracted for siding advertised in the CX 1a-7b mailers were told the siding which they purchased would require some maintenance. They were told such things as it would have to be treated twice a year (Creel Tr. 66), would have to be painted every 2 or 3 years (Winsett, Tr. 98), would have to be waxed each year (Hatcher, Tr. 274), would have to be painted (Whaley, Tr. 317). Two of these witnesses were told the siding would not interlock (Winsett, Tr. 97; Whaley, Tr. 317).

23. When a customer who had contracted for the siding offered at $219.50 or less would not be switched to the Imperial grade siding, respondents failed to perform under its contract to install the aluminum siding. Various reasons were given, such as the siding was not in stock.

a. Five witnesses, who contracted for cheaper grade siding between the years 1966-1971, were unable to get performance by American (Creel, Tr. 57-91; Winsett, Tr. 93-119; Cannon, Tr. 223-39; Hatcher, Tr. 82-93; Whaley, Tr. 24-37). Joseph W. Cannon spent

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$25.00 in telephone charges calling American about installation of the cheaper siding job at $259.00, to no avail (Tr. 230-32). He made at least 15 calls to the company (Tr. 236) and was told such things as the siding was not in stock (Tr. 231). He paid $25.00 down on the contract (CX 228) by check to American (CX 50a and b). In spite of his many efforts in prodding American, he never received performance or his deposit back (Tr. 232). Even the Chattanooga Better Business Bureau and the Birmingham Better Business Bureau, whom he contacted, did not get him his money back (Tr. 231-32).

b. Martha Winsett, who had contracted with American for a siding job at $259.00 in September of 1971 (Tr. 98), was promised installation within two weeks (Tr. 100). When no one came to install the siding, she wrote the company but received no answer (Tr. 100-02). Believing she was bound to the contract and wanting siding put on her house, she contacted the Birmingham Better Business Bureau and finally, through their efforts, received a letter from American canceling the contract (Tr. 102-03; CX 46).

c. Mattie Creel signed a contract for the cheaper grade siding at $297.00, paying $50.00 down (Tr. 65; CX 45). Installation, which had been promised in two weeks, was never done (Tr. 69-70). She called American several times and was given various excuses why the job had not been done, such as the company was out of siding (Tr. 69-70). She was finally told her money for down payment was being mailed (Tr. 69-70). When it was not received, she called again and was told she could get "two lawyers" to collect

her down payment and it would not do any good (Tr. 70). Finally, after four months of trying to get the job done or her money back, she contacted the Better Business Bureau and finally received a refund (Tr. 71).

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c. Ben Whaley contracted with American for the cheaper grade siding and paid $39.50 down in 1966 (Tr. 318). He was promised that the siding would be installed by December 15, 1966. As a result of not hearing from them, he wrote letter but received no reply (Tr. 321). His down payment was not refunded until he went to the Better Business Bureau (Tr. 320-21).

d. James Hatcher, who contracted with American for the cheaper grade siding at $335.00 (CX 39c), also failed subsequently to hear from that company (Tr. 276). He had been promised installation within sixty days (Tr. 274). He called at least three times and on one occasion was told it was not in stock (Tr. 276). Subsequently, he answered a similar mailer and contracted with Southern Aluminum Enterprise for a similar job at $398.00 (Tr. 277, 279; CX 40). He never again heard from this company (Tr. 280), which actually is a trade name used by respondent American) Foucha, Tr. 612).

PRICE SAVINGS REPRESENTATION

24. The representation in respondents' mailers that a customer saves $431.00 on the advertised special (CX 1b, 2b, 4b, 7b) clearly implies that the regular price would be $630.50. Also, the representation that $189.50 is a "50% discount special" represents a regular price of $379.00 for the cheaper grade siding. Respondents

do not have a regular price of $630.50, $379.00 or any other regular price for the cheaper grade siding. Respondents admitted there is no regular price for its products and the prices at which they are sold vary from customer to customer, depending on the resistance of the prospective customer (Prehearing Conference, Tr. 27).

25. In its mailer for the Imperial grade siding (CX 8a-b), respondents claim "if you act now save 20% NOW ONLY $1999.00." This clearly infers a regular selling price for the Imperial grade siding of $2493.00 for ten squares, which would amount to $249.30 per square. The amount is much in excess of the usual and the highest price at which the Imperial grade siding is actually sold.

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a. According to respondent Foucha, the maximum price which salesmen would be allowed to charge a customer for Imperial siding is $100 to $150 per square (Tr. 618).

b. According to respondent Smith, the average price of the Imperial siding is only $90 per square (Smith, Tr. 739).

c. Cameron, a salesman, testified the list price for Imperial siding installed with ten squares would be $1595 (Tr. 502). The normal price would be based on $100 per square or $1000 for the job advertised on the mailer CX 8a-b (Tr. 502, 503).

d. Thus, the highest price which a salesman would be authorized to charge for the Imperial grade siding on the mailer would be $1500 and the average price on a job as advertised would be $900-$1000.

e. The claimed regular price is more than two times this average price of a job and 60% in excess of the highest possible price charged customers.

LIMITED TIME OFFER

26. The offer made in the mailers for siding at $219.50 or less was not for a limited time only as represented. The mailers with the offer proclaiming "All American Siding Sale" were sent out to prospective customers each and every week (Smith, Tr. 707-08). In fact, about 50,000 mailers were sent each week (Smith, Tr. 714).

a. The so-called special offer was a continuing offer even though it had the appearance of bait designed to make sales at higher prices. The only sense in which the offer was limited was that American might not send a salesman to the area for an isolated lead (Cameron, Tr. 530-31).

b. The mailer, however, clearly gives the impression that the sale advertised was a limited offer and not being continually made (CX 1a-7b).

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c. The prospective customer considered the price at which the siding was advertised to be an exceptional bargain (Winsett, Tr. 94; Parkerson, Tr. 139; Ellis, Tr. 159; Bryant, Tr. 263).

d. Because it had the appearance of a bargain, the prospective customer mailed it back right away (Bryant, Tr. 263). Some customers sent the card back shortly after receiving the mailer to qualify for the free storm windows, which offer they assumed to be limited (Creel, Tr. 63; Parkerson, Tr. 137).

27. Respondents' salesmen tell customers the reduced price on the Imperial grade siding is a limited offer (American, Tr. 458). As an example, one customer was told the offer of Imperial siding at $995 was limited (Smith, Tr. 251). The Imperial siding is offered continuously at similar prices (See Finding 25).

FREE GIFT REPRESENTATION

28. The mailers state "mail this card today and get your free gift" (CX 1a-7b). Prospective customers do not receive any gift for sending the mailer. In fact, customers do not receive the free gift of storm windows mentioned in is mailers for making a purchase.

a. None of the 20 customer witnesses received any free gift or storm windows.

b. Mrs. Parkerson, who was promised storm windows and doors by the salesman, did not receive them (Tr. 141). The salesman entered "no plastic windows" on her contract (CX 57) to make her believe she would receive aluminum storm windows.

c. The free storm windows are not given to customers who purchase the Imperial grade siding and they are only free with the cheaper material (Campbell, Tr. 767).

d. Salesmen were told to tell customers "that they're plastic, and cost about a dollar each to manufacture" (Cameron, Tr. 433).

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e. Mrs. Creel sent the reply card back in immediately in order to receive the free storm windows offered (Tr. 63). She contracted to purchase

the advertised special in the mailer and did not receive either it or the storm windows (Tr. 68-69).

REPRESENTATIONS REGARDING USE OF HOME IN ADVERTISING

29. Respondents, through their salesmen, offer customers a so-called reduced price if they will allow their homes to be used for advertising and demonstration purposes.

a. All of the customers who purchased the Imperial grade siding were told that they were receiving a price reduction for allowing their homes to be used for advertising purposes (Ellis, Tr. 175; Smith, Tr. 253; Parkerson, Tr. 143; Bryant Tr. 266).

b. In addition to this, James W. Smith was offered $50 for every other job sold as the result of the company using pictures taken of his home (Tr. 253).

30. Respondents, after installation of siding on the homes of purchasers, do not use the homes for demonstration or advertising purposes (Admitted at Prehearing Conference, Tr. 30).

GUARANTEE

31. Respondents, through their salesmen, represent that their Imperial grade siding is guaranteed for life and that customers will receive a written guarantee to this effect.

a. Cameron, a salesman, testified that each and every customer is told he will receive a lifetime guarantee on the Imperial siding (Tr. 450, 456).

b. Customers were told that the expensive siding was guaranteed "just as long as it was on the house" (Bryant, Tr. 267). James W. Smith, who

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was told it was guaranteed a lifetime (Tr. 251), was also told "we'll guarantee it not to blow off" (Tr. 250).

32. Responents' written guarantee on the Imperial grade siding is as follows:

> "Vendor guarantees this aluminum siding applied on your home to be free from defects of workmanship and material, and shall replace any defective part free of charge for the lifetime of your structure; however, the seller will not be responsible for defects or damages arising through negligence of purchaser or acts of anyone else." (CX 9; Foucha, Tr. 626-27).

33. Respondents do not furnish each customer the written guarantee on the Imperial grade siding (Smith, Tr. 251-52; Bryant, Tr. 268).

34. Respondents' home improvement products are not unconditionally guaranteed. Such guarantee as may be provided is subject to numerous terms, conditions and limitations respecting the duration of the guarantee and the extent and manner of performance thereunder (Admitted, Prehearing Conference, Tr. 31).

35. Respondents do not fully honor the guarantee on the Imperial grade siding.

Illustrative is the fact that the Imperial grade siding which was installed by respondents on James W. Smith's home blew off and respondents refused to fix it, claiming this was not covered by the guarantee (Tr. 250, 252).

36. Respondents' representations on its mailers for cheaper grade siding "100% Guaranteed Genuine Aluminum Siding," "One lifetime installation protects forever" and "Enjoy Everlasting Home Beauty" infer that it is guaranteed to last and protect one's home indefinitely. One witness expressed it this way, "I just took it from the card that it was good aluminum and it was—I kind of took it as a lifetime guarantee" (Ellis, Tr. 171).

37. There was no guarantee on the cheaper grade siding other than that it was 100% aluminum siding (Foucha, Tr. 627). Salesmen told prospective customers that the only guarantee on the cheaper grade siding was that it would be installed properly (Cameron, Tr. 447).

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NEVER REQUIRES PAINTING

38. Respondents, by the statements in their mailers (CX 1a-7b), "Stop Unnecessary Home Problems" and "Enjoy Everlasting Home Beauty", imply that the siding advertised will not require painting or other maintenance.

39. The cheaper grade siding advertised requires maintenance including painting at regular intervals according to what respondents' salesmen tell prospective customers (see Finding 22).

COUNT II

Alleging violations of the Truth in Lending Act and the implementing regulation promulgated thereunder and of the Federal Trade Commission Act,

40. Respondents regularly extended, and for some time last past have regularly extended, consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act duly

promulgated by the Board of Governors of the Federal Reserve System (Corp. par. 11; Ans. par. 11; Admitted, Prehearing Conference, Tr. 39):

41. Respondents, in their mailers advertising aluminum siding, state that it can be purchased with "no down payment" without disclosing the other terms of sales, such as:

a. The cash price;

b. The number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

c. The amount of the finance charge expressed as an annual percentage rate; and

d. The deferred payment price.

(Admitted, Prehearing Conference, Tr. 41).

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42. Since the Truth in Lending Act went into effect on July 1, 1969, respondents have caused the following additional information and clause to appear in their contracts with credit customers:

> "The undersigned agree(s) that due to the custom nature of the work called for herein (he) (they) will pay as liquidated and agreed damages the sum of 25% of the agreed price upon (his) (their) cancellation of this agreement . . . ."

(CX 24c, 25c, 37, 42, 57)

43. By and through the use of the above-quoted additional information and clause, respondents have and are representing to their customers that they are liable for damages in the event that these customers exercise their right to rescind, and said additional information misleads and confuses the customer and contradicts, ob-

scures and detracts attention from the information required by Regulation Z to be disclosed.

a. The experience of Billy Ellis, who testified at the hearings, illustrates how a prospective customer can be confused about his right to rescind the contract under the Truth in Lending Act.

b. Ellis contracted for the Imperial grade siding on October 9, 1969 (CX 32; Tr. 182). He was given a group of papers in an envelope, which he was told by the salesman to keep and not do anything with them until hearing from the company (Tr. 183). The next day after signing the contract, Ellis decided he had made a bad deal and would like to back out (Tr. 183). He did not do anything about backing out of the contract because the contract had the appearance of being legally binding (Tr. 183-84).

HOLDER IN DUE COURSE

44. In a substantial number of instances and in the usual course of their business, respondents sell and transfer their customers' obligations to various financial institutions. In any subsequent legal action to collect on such obligations, these financial institutions or other third parties, as a

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general rule, have available and can interpose various defenses which may cut off certain valid claims customers may have against respondents for their failure to perform or for certain unfair, false, misleading or deceptive acts and practices.

a. This was admitted by respondents at a prehearing conference, Tr. 37-38.

b. The experience of James W. Smith illustrates how a customer has no recourse against the lending institution purchasing his contract with respondents. Smith claimed that respondents failed to honor their guarantee on the Imperial grade siding installed on his home (Tr. 250, 252). Consequently, Smith complained to the finance company to whom he was making payments, Avco, that American had not completed service on his house (Tr. 255). Smith testified regarding Avco's reply as follows: "They said there wasn't nothing they could do about it. It was between me and the company, American Aluminum Corporation." (Tr. 255).

CONCLUSIONS

45. Respondents consistently employ "bait and switch" tactics in selling their aluminum siding, which inherently is a deceptive practice.

a. The offer in its mailers to sell aluminum siding fully installed with free storm windows for a price of $219.50 or less is not a *bona fide* offer but rather one used as bait to obtain leads of prospective customers who can then be sold the more expensive aluminum siding on which respondents realize a more substantial profit (Findings 15-19). The fact that this siding is not generally sold is enough to draw an inference of a switch.

b. To accomplish the switch, respondents disparage the aluminum siding which it extensively advertises, by use of unpainted samples and running it down (Findings 20, 21). This

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method of selling, as employed by respondents, presents a bait and switch scheme including most all of the elements of that practice and clearly fits the definition of this unfair practice set forth in the Commission's Guides Against Bait Advertising. (CCH Trade Reg. Rep. ¶ 39,011 November 24, 1959):

> "Bait advertising is an alluring but insincere offer to sell a product or service which the advertiser in truth does not intend or want to sell. Its purpose is to switch consumers from buying the advertised merchandise, in order to sell something else, usually at a higher price or on a basis more advantageous to the advertiser. The primary aim of a bait advertisement is to obtain leads as to persons interested in buying merchandise of the type so advertised."

c. The bait and switch nature of respondents' operation is evidence by practices condemned by the Guides:

1. Respondents' offer to sell advertised product in advertisements is not a bona fide effort to sell it (Guide 1).
2. The first contact or interview with the customer is secured by deception in that the offer in respondents' advertisements does not truthfully represent the product and nature of the offer (Guide 2).
3. Respondents refuse to sell the product offered in accordance with the terms of the offer (Guide 3(a)).
4. Respondents and their representatives disparage the advertised product (Guide 3(b)).

5. Respondents do not have a sufficient quantity of the advertised product to meet reasonably anticipated demands (Guide 3(c)).

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6. Respondents show or demonstrate a product that is defective, unusable, or impractical for the purpose represented in the advertisement (Guide 3(e)).
7. Respondents use a sales plan or a method of compensation for salesmen designed to prevent or to discourage them from selling the advertised product (Guide 3(f)).
8. Respondents fail to deliver the advertised product and make refunds (Guide 4(b)).

d. The facts here are also almost identical to the factual situation presented in *All-State Industries of N. C., Inc.* v. *FTC*, 465, 423 F.2d 423 (4th Cir. 1970), *cert. denied*, 400 U.S. 828 (1970). There, the Court of Appeals affirmed a decision of the Federal Trade Commission holding bait and switch practices to be a deceptive practice.[7]

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[7] The Commission described the practices in its *All-State* decision, 75 F.T.C. 465, 485, as follows:

> "Respondents' principal method of advertising is through mail-outs which include return mail cards. These mail-out advertisements promote an inexpensive product within respondents' product line which they refer to as an "ADV" product. The ADV product is ostensibly offered at a substantial reduction from a fictitious "regular" price for a fictitious "limited" time. Respondents also sell a more expensive line of similar products which they term "PRO" products. When prospective customers return the mail cards to respondents, the cards are turned over to salesmen who make appointments with the prospective customers. Respondents' sales approach is to attempt to obtain a signed contract for sale of the ADV

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e. The only difference here and *All-State, supra,* is that respondents herein do not install the cheaper grade siding which they advertise (see Finding 17), making this even a more obvious example of bait and switch. See *Royal Construction Company,* 71 F.T.C. 762 (1967), where similar sales methods were found to be bait and switch practices.

46. Respondents have engaged in deceptive advertising by claiming that their products are being offered at special or reduced prices and for a limited time only.

a. Respondents misrepresent the savings to a prospective customer on their siding advertised at $219.50 or less and on their Imperial grade siding (Findings 24 and 25) and that the offers on both grades siding are limited (Findings 26-27).

b. In *All-State Industries, supra,* the respondents therein also represented in their mailouts that their prices were specials and reduced for a limited time only. It was held therein that the representations of price savings and that the offer was limited were deceptive because "with minor changes from time to time, respondents'

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product along with a signed note for the price of the product and a deed in blank. After obtaining the signed contract, the salesman proceeds to disparage the ADV product by pointing out a multitude of deficiencies in the product. The salesman then produces a sample of the PRO product, embarks upon a lengthy discussion of its virtues in contrast with the deficiencies of the ADV and concludes, whenever possible, by selling the PRO product to the customer in place of the ADV product. Respondents do, however, install the ADV product if a customer insists or demands its installation in accordance with the ADV contract."

prices for their ADV products have always remained substantially the same and do not represent any reduction from previously established prices." (75 FTC at p. 477).

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c. In *Royal Construction Company, supra* at 781, the representation "limited time" in connection with their special offer of aluminum siding was held to be a deceptive practice because "respondents regularly advertised the so-called aluminum siding over a period of two years."

47. Respondents have engaged in deceptive advertising by misrepresenting that customers will receive a free gift by sending in the mailout business reply card or making a purchase. See Finding 28 and *Royal Construction Company, supra* at 782-85, where the same practice was held to be deceptive.

48. Respondents have engaged in deceptive advertising and selling practices by advising prospective customers that their homes may be used for advertising purposes and thereby granting a reduction from prices originally quoted. See Findings 29-30 and *All-State Industries,* 75 F.T.C. 477, 478, wherein the same representation was held to be a deceptive practice.

49. Respondents have engaged in a deceptive practice by misrepresenting the guarantee on the products they sell. See Findings 31-37 and *All-State Industries,* 75 F.T.C. 478, wherein it was held that the representation "100% Guaranteed Genuine Aluminum Siding" in mailouts was deceptive where the "Actual guarantee, when presented to a customer, is not an unconditional 100% guarantee." Here, the siding advertised at $219.50, or less, was not guaranteed at all, although it was represented to be "100% Guaranteed Genuine Aluminum

Siding" in the mailouts. See Guide I of the FTC Guide Against Deceptive Advertising of Guarantees, CCH Trade Reg. Rep. ¶ 39,014, April 26, 1960, which requires full disclosure of all facts whenever a guarantee is advertised.

50. Respondents have engaged in a deceptive practice by misrepresenting that its aluminum siding never requires repainting (see Findings 38-39).

51. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial

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quantities of respondents' products by reason of said erroneous and mistaken belief.

a. It long has been established that the Commission may utilize its accumulated expertise to determine what direct and implied representations are contained in such advertising. *Pfizer, Inc.*, F.T.C. Docket No. 8819 (1972); *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965), and its expertise may be similarly applied to determine what facts are material to consumers and whether such information has been withheld. (*Pfizer, supra*). Moreover, in making such determinations, the Commission may draw its own inferences from the advertisements and need not depend on testimony or exhibits, aside from the advertisements themselves, introduced into the record. *Carter Products, Inc.* v. *FTC*, 323 F.2d 523 (5th Cir. 1963).

b. A finding of actual deception is not prerequisite to proof of a violation of the Federal Trade Commission Act, and representations merely having the capacity to deceive are unlawful. *Charles of the Ritz Dist. Corp.* v. *FTC*, 143 F.2d 676, 680 (2nd Cir. 1944).

c. "The important criterion in determining the meaning of an advertisement is the net impression that it is likely to make on the general populace." *National Bakers Services, Inc.* v. *FTC*, 329 F.2d 365, 367 (7th Cir. 1964). In determining the impression created by an advertisement, the Commission need not look to the technical interpretation of each phrase but must look to the overall impression likely to be made on the buying public. *Murray Space Shoe Corporation* v. *FTC*, 304 F.2d 270, 272 (2nd Cir. 1962).

d. Although a statement "may be obviously false to those who are trained and experienced [this] does not change its character, nor take away its power to deceive others less experienced." *FTC* v. *Standard Education*

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Society, et al, 302 U.S. 112, 116 (1937). The fact that the representation may be obviously false to the more sophisicated is immaterial.

52. The aforesaid acts and practices of respondents, as herein found, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.[8] This deception of pur-

[8] Respondents admit that they have been in substantial competition in commerce, with corporations, firms and individuals in the sale of aluminum siding and other aluminum home improvement products of the same kind. (Comp. par. 8; Ans. par. 8).

chasers constitutes unfair competition. *FTC* v. *Winsted Hoisery Co.*, 258 U.S. 483 (1922). In reaching this conclusion, the Administrative Law Judge has evaluated respondents' practices in light of the capacity of the advertisements to deceive, and the inherent unfairness of the advertisements and the practices, and not on the basis of a demonstrated injury to purchasers. *Montgomery Ward & Co.* v. *FTC*, 379 F.2d 666 (7th Cir. 1967); *Charles of the Ritz, supra.*

53. Moreover, by the acts described above, respondents have failed to comply with the provisions of Regulation Z, the implementing regulation of the Truth in Lending Act duly promulgated by the Board of Governors of the Federal Reserve System, which failure constitutes a violation of the Federal Trade Commission Act pursuant to Section 103(q) of the Truth in Lending Act.

54. In their proposed findings and conclusions of law, respondents urge the Administrative Law Judge to conclude that there "is no evidence to support the allegations of the complaint that respondents Norman J. Foucha and Bobby G. Smith, in their *individual capacities*, violated the provisions of the Federal Trade Commission, or the Truth-in-Lending Act." However, the named individual respondents admittedly were the persons responsible for the management, direction and control of the corporate respondent. Effective administration of the Federal Trade Commission Act and the Truth in Lending

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Act dictate that an outstanding order be directed against the responsible individuals and not merely against a lifeless corporate entity. For respondents Norman J. Foucha and Bobby G. Smith were, and Bobby G. Smith now is, in fact, the alter ego of American Aluminum Corporation.

Cf. *Fred Meyer, Inc.*, 63 F.T.C. 1; *Pati-Port, Inc.* v. *Federal Trade Commission*, 313 F.2d 103, 105 (4th Cir. 1963).

55. Since one of the essential purposes of both the Federal Trade Commission Act and the Truth in Lending Act is the protection of the public, the Commission necessarily must "be allowed effectively to close all roads to the prohibited goal, so that its order may not be bypassed with impunity." *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952). The remedy in the accompanying order has a reasonable relationship to the unlawful practice here found to exist. It is the only action which reasonably could be calculated to preclude a revival of the illegal practices.

56. The Federal Trade Commission has jurisdiction of and over respondents and the subject matter of this proceeding.

57. The complaint herein states a cause of action and this proceeding is in the public interest.

58. This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.[9]

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[9] Section 102 of the National Environmental Policy Act of 1969 (Public Law 91-190), specifically requires that all agencies of the Federal Government shall, to the fullest extent possible,

> "(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly effecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,

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> (ii) any adverse environmental effects which cannot be avoided should the proposal be impleemnted,

[Footnote continued on page 56a]

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ORDER

IT IS ORDERED that respondents American Aluminum Corporation, a corporation, and its officers, and Norman J. Foucha and Bobby G. Smith, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any

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[9] [Continued]

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

But see *Harlem Valley Transportation Association* v. *George M. Stafford*, Civil No. 73-Civ. 1330, S.D.N.Y., June 21, 1973, where the Court emphasized that the agency "should determine at the outset of * * * proceedings whether 'major Federal actions significantly affecting the quality of the human environment' are involved within the meaning of 42 U.S.C. § 4332(2)(C), and, if so, (2) to require staff preparation of a draft impact statement for circulation to the parties. . ."; and *Hanly* v. *Kleindienst*, 471 F.2d 823 (2nd Cir. 1972) where the Second Circuit Court of Appeals held at p. 836 that:

"Notwithstanding the absence of statutory or administrative provisions on (threshold determinations), this Court has already held in *Hanly I* * * * that federal agencies must 'affirmatively develop a reviewable environmental record . . . even for purposes of a threshold (NEPA) determination.' We now go further and hold that before a preliminary or threshold determination of significance is made the responsible agency must give notice to the public of the proposed major federal action and an opportunity to submit relevant facts which might bear upon the agency's threshold decision. * * * The precise procedural steps to be adopted are better left to the agency, which should be in a better position to determine whether solution of the problems with respect to a specific major federal action can better be achieved through a hearing or by informal acceptance of relevant data."

corporate or other device, in connection with the advertising, offering for sale, sale, distribution or installation of aluminium siding, storm windows, storm doors or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, any advertising, sales plan, scheme or device wherein false, misleading or deceptive statements or representations are made in order to obtain leads or prospects for the sale of other merchandise or services.

2. Making representations purporting to offer merchandise for sale when the purpose of the representation is not to sell the offered merchandise but to obtain leads or prospects for the sale of other merchandise at higher prices.

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3. Discouraging the purchase of or disparaging any merchandise or services which are advertised or offered for sale.

4. Representing, directly or by implication, that any merchandise or services are offered for sale when such offer is not a bona fide offer to sell such merchandise or services.

5. Representing, directly or by implication, that any price for respondents' products and/or services is a special or reduced price, unless such price constitutes a significant reduction from an established selling price at which such products and/or services have been sold in substantial quantities by respondents in the recent regular course of their business; or misrepresenting, in any manner, the savings available to purchasers.

6. Representing, directly or by implication, that any offer to sell products is limited as to time or is limited in any other manner.

7. Representing, directly or by implication, that persons will receive a gift of a specified article of merchandise, or anything of value.

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8. Representing, directly or by implication, that the home of any of respondents' customers or prospective customers will be used as a model home, or otherwise, for advertising, demonstration or sales purposes.

9. Representing, directly or by implication, that any allowance, discount or commission is granted by respondents to purchasers in return for permitting or agreeing to allow the premises on which respondents' products are installed to be used for model homes or demonstration purposes.

10. Representing, directly or by implication, that any of respondents' products are guaranteed, unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed; or making any direct or implied representation that any of respondents' products are guaranteed unless in each instance a written guarantee is given to the purchaser containing provisions fully equivalent to those contained in such representations.

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11. Representing, directly or by implication, that any product is guaranteed for life without clearly

and conspicuously disclosing the life to which such reference is made; or misrepresenting, in any manner, the duration, nature or extent of any guarantee.

12. Representing, directly or by implication, that respondents' products will never require repainting; or misrepresenting, in any manner, the durability or efficacy of respondents' products.

13. Failing to deliver a copy of this order to all present and future salesmen or other persons engaged in the sale of respondents' products and to secure from each salesman or person a signed statement acknowledging receipt of said order.

14. Assigning, selling or otherwise transferring respondents' notes, contracts or other documents evidencing a purchaser's indebtedness, unless any rights or defenses which the purchaser has and may assert against respondent are preserved and may be asserted against any assignee or subsequent holder of such note,

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contract or other documents evidencing the indebtedness.

15. Failing to include the following statement clearly and conspicuously on the face of any note, contract or other instrument of indebtedness executed by or on behalf of respondents' customers:

"NOTICE"

"Any holder takes this instrument subject to the terms and conditions of the contract which gave rise to the debt evidenced here-

by, any contractual provision or other agreement to the contrary notwithstanding."

16. Failing to maintain adequate records:

(a) For a period of five (5) years which disclose the factual basis for any representations or statements as to special or reduced prices, as to usual and customary retail prices, as to savings afforded to purchasers, and as to similar representations of the type described in paragraph 5 of this order.

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(b) For a period of five (5) years, with regard to each and every contract hereafter entered into between respondents and their customers, which disclose, in itemized form, what each customer was charged, exclusive of interest or finance charges, for materials and for labor, and for those contracts involving siding, or the installation of siding, or both, additional information as to the total amount of siding materials and other materials installed or delivered to the customer, the type and grade of said siding and other materials, a description of the installation performed, the total amount of money paid to salesmen, agents or representatives for the solicitation of the said contracts, and what each customer was charged exclusive of interest or finance charges per square foot for the performance of the said contract.

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(c) For a period of five (5) years invoices, notices for payment and all similar documents

which respondents receive in the conduct of their business from suppliers, subcontractors and other persons, and for a period of five (5) years copies of all contracts entered into between respondents and their customers.

II

IT IS FURTHER ORDERED that respondents American Aluminum Corporation, a corporation, and its officers, and Norman J. Foucha and Bobby G. Smith, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device in connection with any advertisement or consumer credit sale of home improvement products or services, or any other products or services, as "advertisement" and "credit sale" are defined in Regulation Z (12 CFR 226) of the Truth in Lending Act (P.L. 90-321, 15 U.S.C. 1601 *et seq.*), forthwith cease and desist from:

1. Representing, directly or by implication, in any advertisement as "advertisement" is

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defined in Regulation Z, the amount of the downpayment required or that no downpayment is required, the amount of any installment payment, the dollar amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit, unless all of the following items are stated in terminology prescribed under Section 226.8 of Regulation Z:

(i) the cash price;

(ii) the amount of the downpayment required or that no downpayment is required, as applicable;

(iii) the number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(iv) the amount of the finance charge expressed as an annual percentage rate; and

(v) the deferred payment price.

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2. Representing, directly or by implication, on retail installment contracts, promissory notes, or on any written document or orally, that customers will or may be liable for damages, penalties or any other charges for exercising their right to rescind that is provided by Section 226.9 of Regulation Z.

3. Supplying any additional information, contract clause or other statement about the customer's liability or obligations in the event that the customer exercises his right to rescind except that information furnished in accordance with Section 226.9 of Regulation Z.

4. Supplying any additional information, in writing or orally, that is stated, utilized or placed so as to mislead or confuse the customer or that contradicts, obscures or detracts attention from the information that is required to be disclosed by Regulation Z, as prohibited by Section 226.6(c) of Regulation Z.

5. Failing, in any consumer credit transaction or advertisement, to make all disclosures,

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determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.8, 226.9 and 226.10 of Regulation Z.

III

IT IS FURTHER ORDERED that the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

IT IS FURTHER ORDERED that respondents shall forthwith deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondents' products or services, and shall secure from each such salesman or other person a signed statement acknowledging receipt of said order.

IT IS FURTHER ORDERED that respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

IT IS FURTHER ORDERED that the individual respondents named herein promptly notify the Commission of the

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discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the

business or employment in which they are engaged as well as a description of their duties and responsibilities.

/s/ David H. Allard
DAVID H. ALLARD,
Administrative Law Judge.

* * * *

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(Issued: July 2, 1974)

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Lewis A. Engman, Chairman
Paul Rand Dixon
Mayo J. Thompson
M. Elizabeth Hanford
Stephen Nye

Docket No. 8865

In the Matter of

AMERICAN ALUMINUM CORPORATION,
a corporation, and
NORMAN J. FOUCHA and
BOBBY G. SMITH, individually
and as officers of said corporation.

FINAL ORDER

This matter having been considered on respondents' appeal from an initial decision of the administrative law judge of October 9, 1973, and the Commission having determined that said appeal should be granted in part and denied in part in accordance with the accompanying opinion of the Commission:

IT IS ORDERED that respondents American Aluminum Corporation, a corporation, and its officers, and Norman J. Foucha and Bobby G. Smith, individually and as officers of said corporation, and respondents' agents representatives and employees, directly or through any corporate or other device, in connection with the adver-

tising, offering for sale, sale, distribution or installation of aluminium siding, storm windows, storm doors or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

[483]

1. Using, in any manner, any advertising, sales plan, scheme or device wherein false, misleading or deceptive statements or representations are made in order to obtain leads or prospects for the sale of other merchandise or services.

2. Making representations purporting to offer merchandise for sale when the purpose of the representation is not to sell the oeffred merchandise but to obtain leads or prospects for the sale of other merchandise at higher prices.

3. Discouraging the purchase of or disparaging any merchandise or services which are advertised or offered for sale.

4. Representing, directly or by implication, that any merchandising or services are offered for sale when such offer is not a bona fide offer to sell such merchandise or services.

5. Representing, directly or by implication, that any price for respondents products and/or services is a special or reduced price, unless such price constitutes a significant reduction from an established selling price at which such products and/or services have been sold in substantial quantities by respondents in the recent regular course of their business; or misrepresenting, in any manner, the savings available to purchasers.

6. Representing, directly or by implication, that any offer to sell products is limited as to time or is

limited in any other manner, unless such represented limitations are actually in force and are in good faith adhered to.

7. Falsely representing, directly or by implication, that persons will receive a gift of a specified article of merchandise, or anything of value.

8. Falsely representing, directly or by implication, that the home of any of respondents' customers or prospective customers will be used as a model home, or otherwise, for advertising, demonstration or sales purposes.

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9. Falsely representing, directly or by implication, that any allowance, discount or commission is granted by respondents to purchasers in return for permitting or agreeing to allow the premises on which respondents' products are installed to be used for model homes or demonstration purposes.

10. Representing, directly or by implication, that any of respondents' products are guaranteed, unless the nature and extent of the guarantee, the identity of the gurantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed; or making any direct or implied representation that any of respondents' products are guaranteed unless in each instance a written guarantee is given to the purchaser containing provisions fully equivalent to those contained in such representations.

11. Representing, directly or by implication, that any product is guaranteed for life without clearly and

conspicuously disclosing the life to which such reference is made; or misrepresenting, in any manner, the duration, nature or extent of any guarantee.

12. Representing, directly or by implication, that respondents' products will never require repainting; or misrepresenting, in any manner, the durability or efficacy of respondents' products.

13. Failing to deliver a copy of this order to all present and future salesmen or other persons engaged in the sale of respondents' products and to secure from each salesman or person a signed statement acknowledging receipt of said order.

14. Failing to maintain adequate records:

(a) For a period of five (5) years which disclose the factual basis for any representations or statements as to special or reduced prices, as to usual and customary retail prices, as to savings afforded to purchasers, and as to similar representations of the type described in paragraph 5 of this order.

[485]

(b) For a period of five (5) years, with regard to each and every contract hereafter entered into between respondents and their customers, which disclose, in itemized form, what each customer was charged, exclusive of interest or finance charges, for materials and for labor, and for those contracts involving siding, or the installation of siding, or both, additional information as to the total amount of siding materials and other materials installed or delivered to the csutomer, the type

and grade of said siding and other materials, a description of the installation performed, the total amount of money paid to salesmen, agents or representatives for the solicitation of the said contracts, and what each customer was charged exclusive of interest or finance charges per square foot for the performance of the said contract.

(c) For a period of five (5) years invoices, notices for payment and all similar documents which respondents receive in the conduct of their business from suppliers, subcontractors and other persons, and for a period of five (5) years copies of all contracts entered into between respondents and their customers.

II

IT IS FURTHER ORDERED, that respondents American Aluminum Corporation, a corporation, and its officers, and Norman J. Foucha and Bobby G. Smith, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device in connection with any advertisement or consumer credit sale of home improvement products or services, or any other products or services, as "advertisement" and "credit sale" are defined in Regulation Z (12 CFR 226) of the Truth in Lending Act (P.L. 90-321, 15 U.S.C. 1601 *et seq.*), forthwith cease and desist from:

[486]

1. Representing, directly or by implication, in any advertisement as "advertisement" is defined in Regulation Z, the amount of the downpayment required or that no downpayment is required, the

amount of any installment payment, the dollar amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit, unless all of the following items are stated in terminology prescribed under Section 226.8 of Regulation Z:

(i) the cash price;

(ii) the amount of the downpayment required or that no downpayment is required, as applicable;

(iii) the number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(iv) the amount of the finance charge expressed as an annual percentage rate; and

(v) the deferred payment price.

2. Representing directly or by implication, on retail installment contracts, promissory notes, or on any written document or orally, that customers will or may be liable for damages, penalties or any other charges for exercising their right to rescind that is provided by Section 226.9 of Regulation Z.

3. Supplying any additional information, contract clause or other statement about the customer's liability or obligations in the event that the customer exercises his right to rescind except that information furnished in accordance with Section 226.9 of Regulation Z.

4. Supplying any additional information, in writing or orally, that is stated, utilized or placed so as to mislead or confuse the

customer or that contradicts, obscures or detracts attention from the information that is required to be disclosed by Regulation Z, as prohibited by Section 226.6(c) of Regulation Z.

5. Failing, in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.8, 226.9 and 226.10 of Regulation Z.

III

IT IS FURTHER ORDERED that the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

IT IS FURTHER ORDERED that respondents shall forthwith deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondents' products or services, and shall secure from each such salesman or other person a signed statement acknowledging receipt of said order.

IT IS FURTHER ORDERED that respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

IT IS FURTHER ORDERED that the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or

employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

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IT IS FURTHER ORDERED that respondents, American Aluminum Corporation, Norman J. Foucha and Bobby G. Smith shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

By the Commission, Commissioner Nye not participating.

/s/ Charles A. Tobin
CHARLES A. TOBIN
Secretary

ISSUED: JULY 2, 1974

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OPINION OF THE COMMISSION

By Thompson, Commissioner:

This matter is before the Commission on appeal from an initial decision of an administrative law judge finding that American Aluminum and two of its officers have failed to make certain credit disclosures required by the Truth-in-Lending Act, 15 U.S.C. §§ 1601, *et seq.*, and have engaged in certain deceptive acts and practices in the advertising and sale of various home-improvement products, particularly aluminum siding, all in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(a). The order issued by the law judge would require respondents to make the credit disclosures required by the former statute in their future contracts and advertising and to cease and desist from the other deceptive acts and practices in their future business dealings.

The law judge found, and respondents do not deny: (1) That respondent American Aluminum advertises its aluminum-siding business by sending out "mailers" to local homeowners offering to install such aluminum siding for $189.50 to $219.50 ("low priced siding"), a price that is

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described as a "saving" of $431.00; (2) that these promotional mailers also promise that, if the attached response card is returned within seven days, a set of storm windows will be thrown in as a "free gift" or bonus; (3) that these mailers also imply that the aluminum siding in question will last indefinitely; (4) that homeowners who return these mailers are visited by salesmen who, after execution of the contract for the purchase of the advertised low-priced siding, make every effort to

"switch" the purchaser to a higher-priced product (respondents' "Imperial" aluminium siding); (5) that this "switching" of the customer to the higher-priced product is accomplished by showing him an unpainted and unattractive sample of the advertised low-priced siding, disparaging its durability, and explaining that it would require periodic painting and other costly maintenance; (6) that respondents' salesmen also offer substantial reductions from a purported "regular" price of the higher-priced "Imperial" siding if the customer will permit the use of his home for advertising purposes and promise a written guarantee that the siding will last indefinitely; (7) that in fact all of these representations are false, i.e., no such guarantees are provided, the product does not last indefinitely, customers' homes are never used for advertising or demonstration purposes, and there are no "regular" prices from which a discount *could* be given (the salesmen charge whatever the individual customers will pay, up to certain maxima that are well below the purported "regular price); (8) that respondents have rarely, if ever, actually installed the advertised low-priced siding, even when it has been demanded by particular customers; and (9) that American Aluminum has failed to make a number of credit disclosures required by the Truth-in-Lending Act and has used contracts that tend to mislead the customer as to his right to rescind under that statute.

Respondents contend on appeal, however: (a) That the record does not support the law judge's finding that the two *individual* respondents, Smith and Foucha, are legally responsible for the bait-and-switch practices of the firm's salesmen; (b) that their competitors are engaged in similar practices and hence that the law judge and the Commission committed prejudicial error in denying respondents' pretrial motion for the issuance of subpoenas *duces tecum* directed to a

number of such competing organizations; (c) that the record does not support the law judge's finding of injury to the public; and (d) that the order issued by the law judge is overly broad insofar as it (i) directs its prohibitions to "all" products respondents might sell in the future rather than to those involved in its past deceptions, (ii) prohibits certain representations without regard to whether they might in fact be true, and (iii) abrogates the "holder-in-due-course" doctrine on respondents' future credit sales. We agree that the order goes too far in the last two particulars but otherwise affirm and adopt the law judge's decision.

It is a well-settled principle of law that the Federal Trade Commission is not precluded from stopping the law violations of a particular firm merely because some other firms might be engaged in similar practices. *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411 (1958); *United Biscuit Co.* v. *Federal Trade Commission*, 350 F.2d 615, 624 (7th Cir. 1965), *cert. denied*, 383 U.S. 926 (1966). And since injury to competitors is not a necessary element of a case charging deception of the public, *Federal Trade Commission* v. *Algoma Lumber*, 291 U.S. 67, 81 (1934), the data respondents sought to gather by the requested subpoenas *duces tecum* would have been irrelevant to this proceeding. Nor is it a defense in such a case to show that the public has not in fact been injured [1] by the challenged deception. Section 5(b) of the Federal Trade Commission Act requires that, as a condition to filing a complaint, (1) the Commission must have "reason to believe" an unfair or deceptive act

[1] American Aluminum's officials testified that its prices were 30% to 50% lower than those of a particular competitor. Tr. 516-522, 661-664, 725-727. Since complaint counsel had not legal obligation to attempt a rebuttal of this irrelevant testimony, it naturally stands "uncontroverted" in the record.

or practice has occurred and (2) it must "appear" to the Commission that a proceeding to stop that violation "would be to the interest of the public . . ." 15 U.S.C. 45(b). Once such a complaint has been issued, however, the courts will not review the mental processes of the Commission in arriving at that decision nor permit the

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charged party to litigate the adequacy of the data on which the Commission acted.[2] The issue to be litigated, rather, is "whether the alleged violation has in fact occurred." *Exxon Corporation*, Docket 8934 (Order of the Commission, June 4, 1974).

The two corporate officers, Smith and Foucha, concede their responsibility for the firm's violations of the Truth-in-Lending Act and the deceptive claims in their printed advertisements, their denials of liability being limited to the "bait-and-switch" practices of their salesmen. The record is clear, however, that they knew about and were involved in those practices. First, they admit their responsibility for sending out the "bait," the mailers purporting to offer the product at a price ($189.50 to $219.50, for an alleged "saving" of $431.00) they will not in fact accept. In other words, the "offers" these two men sent out to the local homeowners in such large quan-

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[2] This is not to imply, of course, that the Commission *itself* does not have at least a duty to consider, in deciding whether a particular proceeding is likely to be "to the interest of the public," the issue of consumer injury. Sensible resource allocation requires that, other things being equal, the Commission focus its limited resources on those matters in which the probable economic benefits to the consuming public are likely to be the largest. These are internal policy questions, however, not issues on which a law violator himself is entitled to be heard.

tities[3] were not, as the law judge correctly found, *bona fide* offers.

Secondly, both of these men were clearly aware of the "switching" operations practiced by their salesmen. Foucha, president and sole stockholder of the firm until January 1971, described the company's sales plan as "step-up selling," i.e., persuading the customer to shift to a higher-priced product after he has already been sold a lower-priced one.[4] Smith, the man who supervised the firm's salesmen prior to his purchase of the company from Foucha in 1971 and its president

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and sole stockholder since that time, devised the salesman-compensation plan used to encourage customer "switching." (The salesman gets "a couple of dollars" if he sells the low-priced siding, versus as much as $150 if he sells the higher-priced product.[5]) Third, both of these men knew that the firm could not have been operated profitably if the product had actually been sold at the advertised low prices.[6] Fourth, a former salesman testified without contradiction that both men had told him he had to sell the higher-priced product in order t

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[3] Approximately 50,000 of these mailers were sent out each *week*. Tr. 714.

[4] Tr. 610-611.

[5] The salesman receives a commission of 50% on that part of the sales price that *exceeds* $65 per "square" (a surface measuring 10 feet by 10 feet or a total of 100 square feet). Since the firm's average sales price is approximately $90 per square, the average sales commission is some $12.50 per square or roughly $125 on a somewhat below average 10-square (1,000 square feet) installation or job. See tr. 412, 621, 678, 739.

[6] Initial Decision, pp. 8-9. "On a $199.50 job, the siding would cost [respondents] a minimum of $100, the installation cost would

get a commission.[7] Fifth, the number of protests lodged with the company by customers demanding performance at the advertised low price or their money back is simply inconsistent with any possibility that these men could have been unaware of what was going on.[8]

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These same considerations persuade us that any order issued here, if it is to be effective, must extend to "all" products these respondents might sell in the future. This is not a case in which a relatively remote corporate official is being charged with constructive responsibility for an unlawful act committed by a couple of salesmen in violation of an established and enforced company policy. These men *were* the corporation—its "alter ego"—and their acts *were* its policies. Deception is a way of life with these respondents, a major part of their stock-in-trade. Having systematically misrepresented their products and their terms of trade for so many years (the firm was organized in 1965), it would be unrealistic, we think, to expect them to voluntarily adopt a program of honest business dealing when and if they find it in their interest to begin selling some new line of products. As modified by us, the law judge's proposed order will bar no legiti-

be $60.00 and overhead expense would be $69.23. This would total $229.23." Id., p. 9. Respondents would thus lose some $30 on each installation at the advertised $199.50 price, even if they (a) paid *no* commission to their salesmen and (b) omitted (as they did anyway) the promised free storm windows. Id. (The prices quoted are for a quantity sufficient to cover 10 squares, i.e., 1,000 square feet. Id., p. 8; tr. 620.) In fact, respondents charge an average price of $900 for a job of this size. See note 5, *supra*.

[7] Tr. 410.

[8] Initial Decision, pp. 10-12. One such customer testified, for example, to having made at least 15 telephone calls to the company in an effort to get the lower-priced product installed or his money back. Tr. 230-236. Despite his own and the efforts of the Chattanooga and Birmingham Better Business Bureaus on his behalf, he got neither. Id.

mate business activity. It will serve, rather, to reinforce those honest impulses that are said to survive to at least some degree in the human breast after even the most prolonged association with a fast branding iron. These are precisely the kinds of respondents the courts had in mind when they affirmed the principle that those caught violating the law must expect some "fencing in." *Federal Trade Commission* v. *National Lead Company*, 352 U.S. 419, 431 (1957).

The record is insufficient, however, to support the provision in the law judge's order that would bar respondents from future recourse to the holder-in-due-course doctrine. This is an appropriate remedy where there is "some evidence of actual or imminent injury from the operation of the doctrine." *Southern States Distributing Company*, Docket 8882 (December 26, 1973), at 13. The respondents in the case before us do negotiate their customer contracts but only one witness testified (and not too clearly) that such negotiation had been used as a bar to his claim against respondents.[9] The Commission will require a more definite showing than this before denying any individual respondent, on a case by case basis, the right to negotiate his commercial paper.

[495]

We also agree that even these respondents should not be prohibited from making a claim they can prove is true. Again such a remedy is appropriate in the situation where the nature of the product dictates that a certain representation, if made, will necessarily be a false one. *Lane* v. *Federal Trade Commission*, 130 F.2d 48 (9th Cir. 1942). Such is not the case here. If respondents should actually adopt the policy of giving away additional "bonus" items, for example, to people who buy

[9] Tr. 255.

their aluminium siding, we see nothing inherently unfair or deceptive about their saying so in their advertisements.

The decision and order of the administrative law judge will be modified in accordance with this opinion and, as so modified, adopted as the decision and order of the Commission.

July 2, 1974

* * * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-3364

AMERICAN ALUMINUM CORPORATION,
NORMAN J. FOUCHA and BOBBY G. SMITH,
Petitioners,

versus

FEDERAL TRADE COMMISSION,
Respondent.

Petition for Review of an Order of the Federal Trade Commission (Alabama Case)

(October 15, 1975)

Before GODBOLD, SIMPSON and CLARK, Circuit Judges.

PER CURIAM: AFFIRM and ENFORCE. See Local Rule 21.[1]

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[1] *See* N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

Supreme Court, U. S.
FILED
MAY 17 1976
MICHAEL RODAK, JR., CLERK

No. 75-1298

In the Supreme Court of the United States

OCTOBER TERM, 1975

AMERICAN ALUMINUM CORPORATION, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The *per curiam* order of the court of appeals (Pet. App. 81a) is reported at 522 F.2d 1278. The opinion and order of the Federal Trade Commission (Pet. App. 65a-80a) and the initial decision and order of the administrative law judge (Pet. App. 25a-64a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1975. On January 5, 1976, Mr. Justice Powell extended the time within which to file a petition for a writ of certiorari to March 13, 1976. The petition was filed on March 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether, in the particular circumstances of this case, involving a prolonged course of unfair and deceptive acts and practices by petitioners in the sale of home improvement products—

1. The Commission properly refused to issue subpoenas in aid of petitioners' effort to show that some of their competitors engaged in similar conduct.

2. The Commission properly included all products sold by petitioners in its order requiring petitioners to cease and desist from engaging in such practices.

STATUTE INVOLVED

Section 5(a) and (b) of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45(a) and (b),[1] provides in part:

> (a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * *
>
> (6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corpations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> * * * * *
>
> (b) * * * If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall * * * issue and cause to be served

[1]Section 5(a)(1) and (6) has been amended to apply to conduct "affecting" as well as "in" commerce (see 15 U.S.C. (Supp. IV) 45(a)(1) and (6)), but this case is based on the law as it stood prior to the amendment.

> on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. * * *

STATEMENT

Petitioners are a closely held corporation engaged in the sale and installation of aluminum siding and other home improvement products and two persons who have been its principal officers and sole stockholders (Pet. App. 27a). In October 1971, the Commission issued a complaint alleging that petitioners had engaged in unfair and deceptive acts and practices in violation of Section 5 (a) of the Federal Trade Commission Act, 15 U.S.C. 45(a), the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and regulations promulgated thereunder (Pet. App. 1a-8a).

Petitioners sought subpoenas *duces tecum* for the asserted purpose of showing that five of their competitors were engaged in the same practices as those alleged by the Commission to be false and misleading (Pet. App. 9a-19a). The administrative law judge denied the motion on the ground that the materials petitioner sought to obtain were irrelevant to the proceeding (Pet. App. 20a-21a).[2]

In October 1973, after the conclusion of hearings, the administrative law judge issued an initial decision in which he determined that petitioners had violated the Federal Trade Commission Act and the Truth in Lending Act by consistently engaging in certain unfair and deceptive acts and practices, such as using "bait and switch" tactics in selling aluminum siding and making misrepresentations concerning "free" gifts, use of a customer's home in advertising, guarantees, and the need for repainting (Pet. App. 25a-55a). Accordingly, the judge issued an order requiring petitioners to cease and

[2]The Commission declined to allow petitioners to take an interlocutory appeal from this ruling (Pet. App. 23a-24a).

desist from such practices with respect to all products they sold or offered for sale (Pet. App. 56a-64a). On appeal, the Commission adopted the opinion and order of the administrative law judge with modifications not here relevant (Pet. App. 65a-80a) and sustained the judge's refusal to issue subpoenas (Pet. App. 75a).

The court of appeals summarily affirmed and enforced the Commission's order (Pet. App. 81a).

ARGUMENT

The decision of the court of appeals is correct, is in accord with the rulings of other courts, and involves only the application of settled principles to particular facts. There is no necessity for further review.

1. Petitioners contend (Pet. 7-13) that the Commission erred in refusing, on grounds of relevance, to issue subpoenas in aid of their effort to establish that some of their competitors were engaging in practices similar to those alleged in the complaint.[3] It is settled, however, that the Commission may properly proceed against one law violator at a time even if many of its competitors may also be in violation of the law. *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 413; *Federal Trade Commission* v. *Universal-Rundle Corp.*, 387 U.S. 244, 251. Furthermore, injury to competitors need not be proven in a case charging deception of the public. *Federal Trade Commission* v. *Algoma Lumber Co.* 291 U.S. 67, 78-79. Accordingly, evidence of such conduct by competitors is ordinarily irrelevant and petitioners have

[3]Although petitioners make passing references to "due process" (Pet. 12), neither their statement of the questions presented nor their listing of the statutory and other provisions involved (Pet. 2-4) indicates a constitutional basis for their claim.

not shown any circumstances justifying an exception to this general principle.[4]

2. Petitioners contend (Pet. 13-18) that the Commission's order exceeded its powers by prohibiting them from engaging in certain unfair or deceptive practices in connection with the sale or offering for sale of "any * * * products" (Pet. App. 66a), rather than being limited to products sold by petitioners in the past.

The Commission, however, has wide discretion in determining the type of order that is necessary to terminate unfair or deceptive trade practices and to protect the public against their repetition, and the remedy selected will be upheld by the courts if it is reasonably related to the unlawful practices found to exist. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392-395; *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428-431; *Federal Trade Commission*

[4]*Marco Sales Co.* v. *Federal Trade Commission*, 453 F.2d 1 (C.A. 2), on which petitioners rely, is inapposite. The court there objected to the Commission's absolute prohibition, through adjudicatory proceedings, of practices engaged in by one company while at the same time approving, through rule-making, virtually identical practices of other companies. "Obviously," said the court, "the Commission cannot be expected to bring simultaneous proceedings against all of those engaged in identical practices. [*Moog Industries* and *Universal-Rundle Corp.*] would be in point if Marco were urging that others, engaged in identical practices competing with him, were not similarly pursued by the Commission. Petitioners here do not so argue. They argue rather that those engaged in the same activity are regulated while Marco is annihilated. In short, it is not that the Commission has failed to act against others but that it has adopted a positive regulatory approach to them totally inconsistent with its approach toward petitioners." 453 F.2d at 6. See *Ger-Ro-Mar, Inc.* v. *Federal Trade Commission*, 518 F.2d 33, 35 (C.A. 2). Petitioners in this case do not contend that the Commission has sanctioned the allegedly deceptive practices of their competitors, only that it has not yet proceeded against them.

v. *Ruberoid Co.*, 343 U.S. 470, 473; *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611-613. Commission orders applicable to "any product" have repeatedly been sustained by this Court (see, *e.g.*, *Federal Trade Commission* v. *Colgate-Palmolive Co.*, *supra*, 380 U.S. at 394-395 ("any product")) and by the courts of appeals.[5]

The question whether such an order in a particular case exceeds the Commission's broad authority thus depends upon the facts of the case. *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 392.[6] In view of the findings that petitioners have long engaged in systematic misrepresentations and that "[d]eception is a way of life with these [petitioners], a major part of their stock-in-trade" (Pet. App. 78a), the comprehensive order here was within the Commission's discretion.

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[5]See, *e.g.*, *Tashof* v. *Federal Trade Commission*, 437 F.2d 707, 715 (C.A. D.C.) ("any article of merchandise"); *Benrus Watch Co.* v. *Federal Trade Commission*, 352 F.2d 313, 324 (C.A. 8), certiorari denied, 384 U.S. 939 ("all Benrus products"); *Carter Products, Inc.* v. *Federal Trade Commission*, 323 F.2d 523, 532 (C.A. 4) (all Carter products); *Consumer Sales Corp.* v. *Federal Trade Commission*, 198 F.2d 404, 408 (C.A. 2) ("other merchandise").

[6]Compare, *e.g.*, *American Home Products Corp.* v. *Federal Trade Commission*, 402 F.2d 232, 237 (C.A. 6); *Grove Laboratories* v. *Federal Trade Commission*, 418 F.2d 489, 496-497 (C.A. 5).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1976.